On the other hand, it is also absolutely clear that Congress did not trust action agencies to unilaterally decide whether their actions would adversely affect listed species or critical habitat – which is precisely what the Self-Consultation Regulation authorizes them to do. Rather, as explained by the Supreme Court, Congress recognized that section 7 was needed precisely because action agencies such as BLM and the USFS had historically afforded their "'primary missions'" a far higher priority than the conservation of imperilled wildlife. TVA v. Hill, 437 U.S. at 185 (internal citation omitted). As explained by Senator John Chafee, one of the principal architects of the ESA:

> [E]ach of my colleagues is fully aware of the commitment that many line agencies have to the completion of proposed projects, in many instances with less than appropriate attention to other important factors such as endangered species . . . They want to get the projects built. To allow a single agency head to determine the advisability of destroying a species or completing the agency's project as proposed, seems a bit like putting the fox in charge of the henhouse.

ESA Leg. Hist. at 995 (emphasis added).

Hence, it was exactly because Congress did not want the "fox in charge of the henhouse" that it demanded that "conflicts between the Endangered Species Act and Federal actions" be "resolved by full and good faith consultation between the project agency and the Fish and Wildlife Service or the National Marine Fisheries Service." Id. at 943-44 (1978 Senate Report). In the course of convincing the Senate to reject an amendment that would have "preempt[ed] the consultation process created under section 7" in favor of allowing action agencies to make their own determinations on compliance with the Act, Senator Chafee further explained that:

> Section 7 requires that Federal agencies consult with the Fish and Wildlife Service when their proposed activities or programs may affect a listed species . . . Conflicts between the Endangered Species Act and other Federal activities are being resolved through this administrative process. The result of consultation is that in almost all cases Federal agencies have found that for both proposed and ongoing projects, modifications or alternatives can be designed which avoid conflict with the Act. Senator Stennis' amendment fails in my

> judgment to recognize this fact. It seeks to avoid conflicts by outright exemptions from the act for large classes of projects. This appears to me stopping the consultation effort before it even has a chance to begin. Senator Stennis' approach has a number of shortcomings which will almost certainly result in unnecessary destruction of endangered species and habitats critical to their existence.

Id. at 994-995 (emphasis added); id. at 1012 (Remarks of Senator Wallop) (the rejected amendment would "not allow us even to go through the consultation process," but would relegate judgments on species impacts to an action agency "whose basic problem in life is not endangered species but the efficient carrying out of whatever that agency is designed to do") (emphasis added).

If Congress believed – as it most assuredly did in enacting and amending the ESA – that "preempt[ing] the consultation process created under section 7" would "result in unnecessary destruction of endangered species and habitats critical to their existence," then it cannot possibly be the case that defendants are free to accomplish the same subversion of section 7 through administrative fiat. Rather, this is the quintessential case where a regulation is contrary to the "'particular statutory language at issue, as well as the language and design of the statute as a whole,'" Household Credit Services, Inc. v. Pfennig, 541 U.S. 232, 239 (2004) (internal citation omitted), and hence must be invalidated under the first step of Chevron.

Since the Self-Consultation Regulation conflicts with the "unambiguously expressed intent of Congress," Chevron, 467 U.S. at 843, the Court need go no further. But even if the Court somehow found Congress's intent "ambiguous," id., defendants' approach in the Regulations – under which post-hoc "monitoring" of a handful of action agency decisions substitutes for actual, ongoing consultation – is certainly not a "reasonable construction of the text" and legislative intent, as it must be to pass muster under the second step of Chevron. Barnhart v. Thomas, 540 U.S.20, 26 (2003) (emphasis added).

Indeed, the Self-Consultation Regulation is contrary to defendants' own prior interpretation of the language and purpose of section 7. When the Reagan Administration promulgated the general consultation regulations in 1986 – thus requiring action agencies to enter into formal consultation unless the FWS or NMFS expressly concurs in a "not likely to adversely affect" determination – the Services stated that the regulations "properly and accurately implement[]" the ESA and "afford[] the protection mandated by section 7 of the ESA." 51 Fed. Reg. 19927 (June 3, 1986) (emphasis added), precisely because the process "utiliz[ed] the expertise of the Service to evaluate the [action] agency's assessment of potential effects or to suggest modifications to the action to avoid potential adverse effects." Id. at 19949.[23]

The Services also stated that the "purpose" of the regulations allowing agencies to consult with the Services "informally" to determine whether projects might adversely affect species – and hence necessitate formal consultation – was to "streamline the consultation process while maintaining the protections afforded species under section 7." Id. at 19927 (emphasis added).

The preamble to the 1986 regulations further explained that the

> Service believes that informal consultation is extremely important and may resolve potential conflicts (adverse effects) and eliminate the need for formal consultation. Through informal consultation, the Service can work with the Federal agency and any applicant and suggest modifications to the action to reduce or eliminate adverse effects.

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[23] Prior to 1986, whenever an agency determined that its action "may affect" a listed species, it was required to initiate formal consultation and obtain a full Bio. Op. from the Service. 51 Fed. Reg. 19948. The 1986 regulations retained this low "trigger" for formal consultation, but created an "exception" for situations where the action agency could convince the Service that the action could be carried out without harming listed species. Id. at 19949 ("the burden is on the Federal agency to show the absence of likely, adverse effects to listed species or critical habitat as a result of its proposed action in order to be excepted from the formal consultation obligation") (emphasis added). But the Self-Consultation Regulation undermines the entire point of this tradeoff by allowing the action agency to invoke the "exception" without meeting the concomitant "burden" to persuade the Service that was imposed by the 1986 rule.

Id. at 19949 (emphasis added). Likewise, in a "Section 7 Consultation Handbook" issued in 1998, the Services stressed that informal consultations protect species because they

> clarify whether and what listed species, proposed, and candidate species or designated or proposed critical habitats may be in the action area; determine what effect the action may have on these species or critical habitats; explore ways to modify the action to reduce or remove the adverse effects to the species or critical habitats; determine the need to enter into formal consultation . . . ; and explore the design or modification of an action to benefit the species.

Section 7 Consultation Handbook (March 1998), at 3-1 (quoted in FWS CR A.R., Vol. 6, at K153). Plainly, therefore, by eliminating any consultation – including the "informal" consultations designed to "streamline" the process while also protecting species – with regard to a myriad of potentially harmful projects, the Services have also contravened their own prior – and far more reasonable – interpretation of the meaning and function of section 7(a)(2) of the ESA.[24]

B. The Self-Consultation Regulation Violates the APA.

The Self-Consultation Regulation is also arbitrary and capricious because, as discussed earlier, defendants have failed to offer even a coherent and consistent explanation – let alone one that is

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[24] While the original section 7 regulations issued in 1986 authorize the Services to adopt "counterpart" regulations, see 50 C.F.R. § 402.04, such regulations were intended simply to "allow individual Federal agencies to 'fine tune' the general consultation framework to reflect their particular program responsibilities and obligations." 51 Fed. Reg. 19937. Thus, the Services did not remotely suggest that such a "counterpart" regulation could simply dispense with the consultation process completely, with respect to an entire category of agency actions. To the contrary, the Services made clear that any "[s]uch counterpart regulations must retain the overall degree of protection afforded listed species by the Act and these regulations," id. (emphasis added). As pointed out by the FWS's Regional Directors, that is obviously not the case with regard to a Regulation that allows action agencies to decide unilaterally whether their own projects will adversely affect species, and hence is "inherently less protective than the existing regulations." FWS CR A.R., Vol. 6, at K417 (memo from Director of FWS Region 5) (emphasis added). Indeed, in adopting the 1986 regulations, the Reagan Administration rejected a proposal that the general trigger for formal consultation be raised from "may affect" to "may adversely affect" precisely because it would have "yielded too much discretion to action agencies" and would not have preserved the Services' role in determining which actions are "likely to have an adverse effect[]." 51 Fed. Reg. 19949 (emphasis added).

supported by record evidence – for why a radical departure from the Services' longstanding approach to section 7 was either necessary or appropriate. As the Court of Appeals has explained, to determine whether an agency "decision reflects a 'rational connection between the facts found and the choice made,' a reasonable explanation of the specific analysis and evidence upon which the Agency relied is necessary." Bluewater Network, 370 F.3d at 21 (quoting State Farm, 463 U.S. at 43); see also Am. Lung Ass'n v. EPA, 134 F.3d 388, 392 (D.C. Cir. 1998) ("judicial review can only occur when agencies explain their decisions with precision, for '[i]t will not do for a court to be compelled to guess at the theory underlying the agency's action'") (internal citation omitted).

As explained previously, when they proposed the Regulation in the first instance, defendants asserted that it was needed to "streamline consultation on proposed projects that support the National Fire Plan" because consultations had "caused delays" in the approval of necessary NFP projects, and the "proposed counterpart regulations will effectively reduce these delays" and result in "faster environmental reviews of proposed land management projects . . .." 68 Fed. Reg. 33806, 33808 (emphasis added). But when public commenters – as well as the FWS's own Regional Directors and CEQ – pointed out that the "proposed rule has failed to offer any empirical evidence substantiating the claim" that consultations "have unnecessarily delayed active land management activities," instead of pointing to any such evidence, the final rule asserts that the "issue is not whether the regulatory process has delayed NFP projects," 68 Fed. Reg. at 68258 (emphasis added) – which is exactly what the proposed rule had said, in no uncertain terms, was the issue.

Since defendants evidently could not substantiate the central rationale they initially proffered for the rule – and, internally at least, admitted they could not support that rationale, see, e.g., FWS CR A.R., Vol. 3, at E140, defendants, when adopting the final rule, simply changed the rationale from

"delays" that had been "caused" to "anticipate[d] . . . future" delays:

> The number of consultations conducted for NFP projects is currently relatively low; however the Service anticipates that the number of consultations requested for projects that implement the NPF will increase substantially in the future, as additional funding and effort is directed toward implementation of the NFP.

68 Fed. Reg. at 68258 (emphasis added). Yet, once again, defendants provided absolutely no evidence establishing the extent to which NFP projects will "increase . . . in the future" or, more important, the concrete basis for predicting that the "anticipat[ed] . . . number of consultations" will cause any delays "in the future." See Bluewater Network, 370 F.3d at 22 ("We can defer to the Agency's prediction of the feasible pace of implementation only if it has adequately explained the basis for that prediction.") (emphasis added); see also Natural Resources Defense Council v. EPA, 655 F.2d 318, 328 (D.C. Cir. 1981) ("the agency must also provide a reasoned explanation of its basis for believing that its projection is reliable").

But even with regard to that rationale for a dramatically different approach to section 7 of the ESA, the preamble to the final rule is at war with itself, since it concedes that the Services and action agencies "currently have several agreements in place" that already "streamline the process significantly by improving coordination between the consulting agencies" regarding NFP projects. 68 Fed. Reg. 68259. Thus, in August 2000, the Services, USFS, and BLM entered into a "Memorandum of Agreement" ("MOA") for the precise purpose of "improv[ing] the efficiency and effectiveness of plan and programmatic level section 7 consultation processes." FWS CR A.R., Vol. 10, at S1 (MOA, ESA Section 7 Programmatic Consultations and Coordination).

The very purpose of the MOA was to "establish a general framework for a 'streamlined' (i.e., easier and more effective) process for interagency cooperation." Id. At the same time, the MOA

stressed that "[n]othing in this MOA is intended to amend 50 CFR part 402" – the general regulations implementing the consultation process – and that "[t]his streamlined process will provide a number of efficiencies, allowing the agencies to better achieve compliance with the ESA and the regulations at 50 CFR part 402 without altering or diminishing the agencies' existing responsibilities under the ESA or its regulations." Id. (emphasis added). The MOA further stated that "[i]t will result in a shortened time frame for the appropriate consultation response (a goal of 30 days or less for concurrence letters and 90 days or less to complete formal consultation)," but that the MOA "in no way alters the commitment of the action agencies to consult at the site-specific level." Id. at S1, S2 (emphasis added).

Even further, however, in October 2002, FWS and NMFS issued a memorandum to their Regional Directors and Administrators setting forth "Alternative Procedures for Streamlining Section 7 Consultation on Hazardous Fuels Treatment Projects." FWS CR A.R., Vol. 10, at S81 (emphasis added). As suggested by the title, this "guidance" document was specifically designed to ensure that the consultation process is "able to stay ahead of the fire management agencies' hazardous fuel treatment projects." Id. Consequently, the guidance "encourages early coordination and cooperation at the project planning stage, the 'batching' of similar projects, and use of design criteria or screens to streamline the consultation process while minimizing the potential for adverse effects on listed species and their habitats at both the landscape and site-specific levels." Id. at S82 (emphasis added). Therefore, according to the October 2002 document, "[s]everal streamlining techniques have been found to be effective" and were already "being used in some areas to facilitate consultation on projects being implemented under the National Fire Plan," while, at the same time, being "consistent with the requirements of section 7(a)(2) and its implementing regulations (50 CFR 402)." Id.

(emphasis added).

Moreover, in addition to these NFP-specific measures, the Services' longstanding section 7 regulations also provide that, "[w]here emergency circumstances mandate the need to consult in an expedited matter, consultation" between the action agency and the Service "may be conducted informally through alternative procedures that the Director [of the Service] determines to be consistent" with section 7 of the ESA. 50 C.F.R. § 402.05(a). This provision for "expedited" consultation "applies to situations involving acts of God, disasters, casualties, national defense or security emergencies, etc." Id. Accordingly, if there were ever a need to consult even more rapidly than thirty days – e.g., in the event of an ongoing fire emergency – the Services' longstanding regulations already expressly provide for that exigency.

In any case, just eight months before proposing the Self-Consultation Regulation, the Services had already adopted specific "techniques" designed to "streamline" consultations on NFP projects and "provide procedures for agencies to efficiently and effectively meet the requirement that each individual hazardous fuels treatment project received the required individual review and complete the requirements of section 7 consultation." Id. at S88 (emphasis added). It would be one thing, of course, if, during those eight months, the Services and action agencies had learned that the "streamlining" techniques were, or would be, unable to prevent delays in approval of necessary projects. But that is hardly the case, as the FWS's Regional Directors – who were responsible for actually administering the October 2002 guidance – advised defendants in no uncertain terms.[25]

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[25] See, e.g., FWS CR A.R. Vol. 6, at K391 ("the Service in Region 2 is already completing informal consultations within 30 days"); id. at K402 (Southeast Region) ("The short response time is not likely to change with these counterpart regulations."); id. at K420-21 (Region 6) ("Information consultations are routinely completed well within 30 days of the action agencies' request to our office . . . As long as the Action Agency is coordinating with our office

Consequently, in the final rule, defendants had little choice but to concede that preexisting "agreements streamline the process significantly by improving coordination between the consulting agencies," and that "[t]hese types of streamlining processes can work well to meet statutory timelines." 68 Fed. Reg. 68259 (emphasis added). But rather than abandon the Self-Consultation Regulation in light of the seemingly damning concession that defendants have no factual basis for asserting either past or likely future delays, defendants instead adopted an even more legally and logically bankrupt rationale for the Regulation: that the recently implemented "streamlining" measures, while "work[ing] well," "still encumber the Service's biologists in requiring concurrences for NLAA actions" and "still require[] involvement of the Service in the concurrence decisions . . .. Id. (emphasis added).

Thus, the ultimate rationale for the Regulation is not only totally tautological – i.e., defendants must excise Service biologists from the consultation process because Service biologists are involved in the consultation process – but also a patent abdication of the role assigned to the Services by Congress. It is hard to conceive of a more arbitrary and capricious course of conduct than one in which defendants found it necessary to play a shell game with the underlying justification for the rule, only to end up with the rationale, in effect, that defendants simply disagree with the consultation process mandated by Congress.[26]

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and apprising the Service of potential effects, informal consultation is already an efficient, timely process."; "[E]xtensive streamlining has already been put in place for NFP projects, and should only improve with time, as experience is gained.") (emphasis added); id. at K427 (Region 3) ("We are unaware of any data supporting the contention that significant delays are problematic").

[26] In defendants' continuing struggle to proffer some rationale for the Regulation, the preamble to the final rule also suggests that the Services' review of NLAA determinations was somehow "diverting their attention from actions that require formal consultation." 68 Fed. Reg. 68529 (emphasis added). But this rationale is simply circuitous, since the Services' review of

While defendants' failure to proffer a defensible rationale for the Regulation is more than sufficient to deem it arbitrary and capricious, the Regulation is equally vulnerable on the other side of the equation, i.e., defendants have not even begun to meaningfully address what will be lost by allowing action agencies to make unilateral decisions as to whether their own actions will adversely affect listed species or critical habitats. As noted, the FWS's own regional offices stressed that the Services' ongoing review of action agencies' NLAA determinations has in fact had enormous benefits for listed species, both by encouraging necessary modifications in projects to mitigate adverse effects, and by ensuring that the best available information on species is brought to bear in evaluating projects, including data on the potentially significant cumulative effects of many individually small projects.[27] The Regional Directors specifically emphasized – as did Congress when it enacted section

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action agencies' findings that their own projects will not adversely affect listed species or critical habitat is the regulatory mechanism by which the Services have determined which actions even require formal consultation. Moreover, once again, neither the final rule, nor anything else in the record, presents a stitch of evidence that Service biologists have been "diverted" from formal consultations on NFP projects by virtue of their work on informal consultations. To the contrary, several FWS Regional Directors not only expressly rejected any such theory, but suggested that the need to implement the Self-Consultation Regulation and ACAs would be far more of a diversion than simply implementing the "streamlining" agreements already in place. See, e.g., FWS CR A.R., Vol. 10, at K415 ("[I]t would be far more efficient to review and provide concurrences on each action rather than the time and effort required for the Service to coordinate, monitor, and evaluate an agency's implementation of a single ACA."); id. at K427 ("informal consultations have not diverted FWS resources . . . These unsubstantiated arguments undermine the credibility of the proposed regulations") (emphasis added).

[27] See, e.g., FWS CR A.R., Vol. 10, at K426 (Region 3) ("[W]e successfully utilize informal consultation, and thereby, substantially eliminate the need for formal consultation and avoid adverse effects to listed species. The tenor of the proposed regulations dismisses out of hand the merits and legitimate utility of informal consultation.") (emphasis added); id. at K427 ("A great number of [NLAA] determinations are made only after the Service reviews the proposed action and identifies measures to avoid adverse effects. Although many informal consultations result in only minor changes, those changes have tremendous conservation benefit.") (emphasis added); id. at K428 ("erroneous determinations are often submitted by action agencies, and only after Service review is the correct finding made") (emphasis added); id.

7 – that the "Action Agencies will be challenged to maintain biological objectivity in light of differences in primary agency missions." FWS CR A.R., Vol. 10, at K416 (Region 5).[28]

The preamble to the final rule concedes that "[m]any commenters believe that the different missions between the Action Agencies and the Service will not allow the Action Agencies to make decisions that would be 'equally as protective of listed species and critical habitat." 68 Fed. Reg. 68259. The preamble further acknowledges that "many commenters noted that historically, the action agencies have pursued environmentally damaging projects," and that "[m]any commenters suggested that eliminating the Service concurrence is like asking the fox to watch the henhouse," id.(emphasis added) – the same phrase used by Senator Chafee in explaining why Congress had required consultation with the Services. See supra at 46.

However, rather than refute these objections – or even dispute that the BLM and Forest Service have routinely "pursued environmentally damaging projects" – defendants simply asserted

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at K420 (Region 6) ("[T]he informal consultation process on a regular basis serves to avoid or minimize project impacts to listed species in a manner that ultimately eliminates the need for formal consultation . . . The counterpart regulations are likely to reduce interagency coordination over the long-term, and consequently reduce the opportunities to develop, and implement beneficial habitat projects.") (emphasis added); id. at K419 ("these regulations will result in a loss of consistency and quality in [ESA] consultations"; "We believe it will be difficult for the action agencies to continually update the environmental baseline conditions for each species, as they will not automatically receive information about the affected species throughout its range"); id. at K416 (Region 5) ("wildlife biology applied in the context of the ESA is a highly specialized field in which no other agency has equivalent expertise"; "The Service's expertise is constantly evolving based on assimilation of new information by Service biologists.").

[28] See also id. at K421 (Region 6) ("The Action Agencies have different missions than the Service and we cannot discount the overriding conflicts that the agencies' wildlife, plant, and fishery biologists face from internal pressures to meet quotas for timber salvage harvest, prescribed fire, etc. Thus, we do not believe that implementation of this proposed regulation will be equally as protective of listed species and designated critical habitat as the current procedures.") (emphasis added).

that the "Action Agencies will appropriately implement their responsibilities under section 7 and these regulations," 68 Fed. Reg. at 68259, and that the action agencies may, under the Self-Consultation Regulation, voluntarily "request informal consultation" if they feel like it. Id. Yet those superficial responses do not even begin to come to grips with the grave concerns raised by "many commenters" and the Services' own officials that action agencies do not have exactly the same expertise as the Services, that USFS and BLM employees do face serious pressures to disregard or downplay the impacts of their projects on listed species – which is why Congress required consultation – and that the existing consultation process has, in fact, had substantial benefits for species that will be lost as a result of the Regulation. Once again, therefore, it could not be clearer that defendants have "'entirely failed to consider an important aspect of the problem,'" and also ignored a "statutorily mandated factor." Public Citizen v. Fed. Motor Carrier Safety Admin., 374 F.3d 1209, 1216, 1222 (D.C. Cir. 2004) (quoting State Farm, 463 U.S. at 43).

Even further compounding defendants' clear APA violation is that the Self-Consultation Regulation not only allows the USFS and BLM to self-consult, but also allows the action agencies to decide unilaterally what projects to self-consult on, while providing no meaningful definition of NFP projects subject to the new rule. Thus, while many commenters – as well as the Services' own officials – urged defendants to at least coherently define the universe of projects subject to the rule and/or provide some check on the action agencies' invocation of it, see, e.g., FWS CR A.R., Vol. 10, at K386 (Region 1) ("A clearer definition of the term 'National Fire Plan' should be included in the final rule."), defendants refused to adopt either minimal safeguard.

Instead, once again, the final rule defines a "Fire Plan Project" as "an action determined by the Action Agency to be within the scope of the NFP as defined in this section," and, in turn, defines

the NFP as the "September 8, 2000, report to the President from the Departments of the Interior and Agriculture[] outlining a new approach to managing fires, together with the accompanying budget, requests, strategies, plans, and direction, and any amendment thereto." 68 Fed. Reg. 68259, 64 (emphasis added). Remarkably, however, the Administrative Record does not even contain any of these "accompanying budget requests, strategies, plans, and direction"; and, when plaintiffs asked defendants to supplement the Record with them – on the theory that they must have been considered by defendants since the final rule incorporated them into a regulatory definition – plaintiffs were advised by government counsel that "all that was considered by the FWS was the report," Exh. 2 at 2 (emphasis added) – i.e., the September 8, 2000 report itself – and hence the other materials comprising the regulatory definition were not (and would not) be included in the Record because they were not even "considered" by the agency decisionmakers. Id. In other words, defendants not only gave the action agencies unfettered discretion to decide what an NFP project is – and thus when the Self-Consultation Regulation may be invoked – but they may make those decisions based on an open-ended definition that the Services themselves do not even know the contours of because it incorporates materials that the Services say they never even glanced at before adopting the final rule.

There is nothing the preamble to the final rule could say to justify this bizarre approach – which is far beyond arbitrary, particularly in the context of Congress's purpose in adopting the ESA and section 7 in particular – but, if possible, the preamble only succeeds in further compounding the problem. Thus, the preamble says that, "[w]hile the definition is broad, the Action Agency will ultimately have to determine if the action will further the goals of the NFP" and "will have the responsibility to justify whether any action it is undertaking falls within the NFP scope." 68 Fed. Reg. 68259 (emphasis added). But the defect with the rule is not just that the definition is extremely

"broad," and its application entrusted entirely to the "fox guarding the henhouse" – although those concerns alone would be sufficient to invalidate the rule – but that the "definition" is, quite literally, meaningless, i.e., noone, including, most important, the agency decisionmakers who adopted an entirely new approach to section 7, even knows what the definition encompasses because they do not know – and claim to have never read – the "budget requests, strategies, plans, and direction, or any amendments thereto," the definition subsumes. Once again, this is the very essence of arbitrary and capricious decisionmaking, particularly in the context of a statute designed to codify the "institutionalization of caution" on behalf of species already on the brink of extinction. TVA v. Hill, 437 U.S. at 178.

C. Defendants Adopted the Regulations in Violation of NEPA.

For many of the reasons discussed above, it is also apparent that defendants' cursory Environmental Assessment must be set aside for more reasoned analysis. To begin with, the EA's blanket assertion that the Self-Consultation Regulation "would not have any environmental effects," FWS CR A.R., Vol. 4, at G184 (emphasis added), inexplicably ignores the views of the FWS's own Regional Directors, as well as many public commenters, who pointed to a multitude of ways in which allowing action agencies to make their own NLAA determinations on a vast but ill-defined array of habitat-disturbing projects will undoubtedly have "environmental effects," including serious adverse impacts on listed species and their habitats. See supra at 55.

Moreover, the EA completely ignores a number of the CEQ "significance" criteria that clearly counsel in favor of preparation of an EIS here. For example, it is evident that the "effects" of the Regulations on the "quality of the human environment are likely to be highly controversial," 40 C.F.R. § 1508.27(4), when the FWS's own Regional Directors are predicting that the Regulations

will have broad, adverse impacts on listed species and their habitats. It is equally clear that the Regulations "establish a precedent for future actions with significant effects or represent[] a decision in principle about a future consideration." Id. at § 1508.27(b)(6) (emphasis added). As many of defendants' own officials explained, "[a]doption of this proposed regulation will facilitate approval of requests by other Action Agencies," since the interpretation of section 7 and underlying rationale embodied in the Regulation can obviously be applied to other agencies that "advocate that with training, they will [also] be able to make appropriate effect determinations." FWS CR A.R., Vol. 6 at K417 (Region 5); see also id. at K429 (Region 3) ("Upon promulgation of the counterpart regulations, we anticipate that other agencies will also wish to adopt similar counterpart regulations for non-NFP actions. The proposed rule sets the precedent for these agencies to follow.") (emphasis added). Yet the EA does not even acknowledge these far-reaching ramifications of the Regulation, let alone coherently explain why they are not sufficiently significant to warrant preparation of an EIS.[29]

CONCLUSION

For the foregoing reasons, the Court should set aside and remand both the Self-Consultation Regulation and the July 2003 Notice on the Lynx listing decision previously remanded by the Court.

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[29] In fact, the Services, in conjunction with the Environmental Protection Agency ("EPA"), have already expanded the self-consultation approach to decisions by EPA regarding the effects of pesticides and similar chemicals on listed species. See 69 Fed. Reg. 47731 (Aug. 5, 2004). Moreover, defendants' inadequate NEPA compliance on the precedential effects of the Regulations at issue here is also already injuring plaintiffs because, predictably, the USFS and BLM are already arguing that the rationale for the Self-Consultation Regulation applies to all projects carried out by the agencies. See Stone Dec. (Exh. 12) at ¶ 15 & Attach. D at 4 (Dec. 15, 2003 memo from USFS and BLM officials) ("we believe that the concept being advocated in the [Self-Consultation] regulations should apply to all projects that meet the land management objectives of the FS and BLM, and not just those that are considered NFP projects").

Respectfully submitted,

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Dated: May 3, 2005

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DEFENDERS OF WILDLIFE, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	
	)	Civ. No. 04-1230 (GK)
GALE NORTON, et al.,	)	
	)	
Defendants.	)	

PLAINTIFFS' STATEMENT OF MATERIAL FACTS
AS TO WHICH THERE IS NO GENUINE DISPUTE

1. In 1994, in response to petitions by conservation groups to list the Lynx, Region 6 of the FWS – which encompasses Lynx historic range in Colorado, Montana, and Wyoming – conducted a comprehensive "review of the status of the species," and concluded that "'Lynx populations in the contiguous United States have suffered significant declines due to trapping and hunting and habitat loss,' and that at least four of the five statutory criteria for listing a species under the ESA apply to lynx." Defenders of Wildlife v. Babbitt, 958 F. Supp. 670, 676 (D.D.C. 1997) ("Lynx I") (internal citation omitted). Hence, Service biologists drafted a proposed listing rule stating that there was substantial scientific evidence to warrant listing one segment of the population in the contiguous U.S. – i.e., Lynx populations in the Northeast, Great Lakes, and Southern Rockies – as endangered, and a second segment – in the Northwest and Northern Rockies – as threatened. Id. This proposal was accompanied by a "50-page analysis of the Lynx's history and current status," Lynx I, 958 F. Supp. at 676, which concluded, based on "extensive citations of scientific evidence," that "Lynx habitat is currently being destroyed, degraded, and fragmented by a number of factors including fire suppression, road construction,

and clearing of forests for urbanization, ski areas, and agriculture." Id. at 676 (citing 1997 Lynx A.R. Doc. 35 at 25-27). Although "not a single biologist or Lynx expert employed by FWS disagreed" with the Region 6 biologists that the Lynx is "endangered throughout most if its historic range in the contiguous U.S., Service officials in Washington, D.C. nonetheless decided that no listing was warranted. Lynx I, 958 F. Supp. at 676.

2. When plaintiffs challenged the FWS's decision not to list the Lynx, this Court, in March 1997, held that the Service's refusal to protect the species under the ESA violated the Act and disregarded extensive evidence in the Administrative Record detailing that at least four of the five listing factors apply to the Lynx, including the "present or threatened destruction, modification, or curtailment of [the species'] habitat or range" and the species' "susceptibility to trapping, which makes it particularly 'vulnerable to extinction.'" Lynx I, 958 F. Supp. at 681-684. The Court further found that there was "overwhelming record evidence documenting the dramatic decrease over time in the Lynx population in the United States portion of its North American range," and that "[w]ildlife experts currently estimate that the number of Lynx in the entire contiguous United States 'may not exceed several hundred individuals – far fewer than many other species now listed as endangered' under the ESA." Id. at 682 (quoting 1997 Lynx A.R. Doc. 248, at 25).

3. In response to the Court's ruling, FWS assembled an "inter-regional team of field biologists that was 'assigned to review the existing administrative record, incorporate any new (and relevant) scientific or commercial data that [had] become available,'" and "develop a new finding." Defenders of Wildlife v. Babbitt, 239 F. Supp. 2d 9, 15 (D.D.C. 2002) ("Lynx III") (internal citation omitted). Once again, the "Service's biologists [] concluded that Lynx had been eliminated from most of their range in the U.S." Id.

4. In May 1997, the FWS published a notice of a new "12-month finding" in the Federal Register. 62 Fed. Reg. 28653-28657 (May 27, 1997). The new finding echoed the 1994 draft proposed rule's assessment of the dire threats to the existence of the Lynx posed by such factors as logging, roadbuilding, fire suppression, and trapping. The FWS once again made detailed findings, supported by extensive scientific documentation, that the Lynx warranted listing based on four of the five statutory criteria: present or threatened habitat destruction, overutilization for commercial purposes, inadequacy of existing regulatory mechanisms, and other natural or manmade factors. Id. The Service also "determined that the overall magnitude of all threats to the small population of the Canada lynx in the contiguous United States is high and the threats are ongoing, thus they are imminent." Id.

5. In July 1998, the FWS published a proposal to list as "threatened" the "contiguous U.S. distinct population segment of the Canada Lynx," 63 Fed. Reg. 36993, on the grounds that this "population segment" is "threatened by human alteration of forests, low numbers as a result of past overexploitation, expansion of the range of competitors (bobcats[] and coyotes[]), and elevated levels of human access into lynx habitat." Id. at 36994. In its proposal, the FWS found that "historically, Canada lynx were residents in 16 of the contiguous United States," but that the

> overall numbers and range of Canada lynx in the contiguous United States are substantially reduced from historic levels. Currently, resident populations of lynx likely exist in Maine, Montana, Washington, and possibly Minnesota. States with recent records of individual lynx sightings, but possibly no longer sustaining self-supporting populations, include Wisconsin, Michigan, Oregon, Idaho, Wyoming, Utah, and Colorado.

Id. at 37007.

6. In supporting its proposal, the Service again found that four of the five statutory bases for listing were satisfied. With regard to each of the statutory factors that the FWS found

supported its listing proposal, the Service published a detailed scientific explanation for why that factor applied. With respect to the destruction and modification of habitat, for example, the Service explained that, "[i]n all regions of the contiguous United States lynx range, clearing of forests for urbanization, recreational developments such as ski areas, and agriculture has fragmented, degraded, or reduced the available suitable lynx habitat, reduced the prey base, and increased human disturbance and the likelihood of accidental trapping, shooting, and highway mortality." 63 Fed. Reg. 37003.

7. In March 2000, the FWS issued a final decision listing the Lynx as threatened, rather than endangered, throughout its range in the contiguous U.S. In its listing decision, the Service found that, "[w]ithin the contiguous United States population segment, the range of the lynx is divided regionally by ecological barriers of unsuitable lynx habitat." 65 Fed. Reg. 16060. The Service identified these four regions as "(1) the Northeastern Region, including Maine, New Hampshire, Vermont, and New York; (2) the Great Lakes Region, including Michigan, Wisconsin, and Minnesota; (3) the Northern Rocky Mountain/Cascades Region, including Washington, Oregon, Idaho, Montana, northwestern Wyoming, and Utah; and (4) the Southern Rocky Mountains Region, including Colorado and southeastern Wyoming." Id.

8. In its listing decision, the "Service itself acknowledged the imperilled status of the Lynx in at least two of its historical regions." Lynx III, 239 F. Supp. 2d at 18. As explained by the Court:

> [w]ith respect to the Northeast region, FWS found that 'the lynx is extirpated from New York;' that although 'Lynx historically occurred in New Hampshire, . . . recent records of lynx occurrence in New Hampshire are rare;' and that 'the State of Vermont currently considers lynx to be extirpated.' Similarly, with respect to the Southern Rockies region, the Service found that 'a resident lynx population historically occurred . . . in both Colorado and southeastern Wyoming . . . [and that] [t]his resident population may now be extirpated.'

Id. (quoting 65 Fed. Reg. At 16055-56, 59). In addition, despite "limited available data," the final listing rule "makes it clear that, if any resident Lynx population does exist in the Great Lakes region, it is rare." 239 F. Supp. 2d at 19 (citing 65 Fed. Reg. at 16057). The listing decision further found that, compared with the species' highly depleted status in the Northeast, Great Lakes, and Southern Rockies, the Northern Rockies/Cascade region now "has the strongest evidence of persistent occurrence of resident lynx populations." 65 Fed. Reg. at 16061.

9. The FWS avoided an endangered listing by announcing that "[c]ollectively, the Northeast, Great Lakes, and Southern Rockies do not constitute a significant portion of the range of the" the Distinct Population Segment ("DPS") consisting of Lynx in the contiguous United States, and do not "contribute substantially to the persistence of the contiguous United States DPS." 65 Fed. Reg. at 16061. Accordingly, the Service concluded that only the "Northern Rockies/Cascades Region is the primary region necessary to support the continued long-term existence of the contiguous United States DPS." Id..

10. In 2000, plaintiffs filed another lawsuit challenging defendants' refusal to list the Lynx as endangered, particularly the agency's finding that three of the four historic Lynx populations in the contiguous U.S. are not "significant." The Court held that the "FWS's conclusion that [] three, of the Lynx's four regions, are collectively not a significant portion of its range is counterintuitive and contrary to the plain meaning of the ESA phrase 'significant portion of its range.'" Lynx III, 239 F. Supp. 2d at 19. The Court further held that the Service's "focus on only one region of the Lynx's population – the Northern Rockies/Cascades – to the exclusion of the remaining three-quarters of the Lynx's historic regions, is antithetical to the ESA's broad purpose to protect endangered and threatened species." Lynx III, 239 F. Supp. 2d at 19. The Court also ruled that "it is clear that FWS's determination that, collectively, three of the four

Lynx populations do not constitute a significant portion of its range is erroneous or, at a minimum, inadequately reasoned," because the "Service's own Final Rule makes clear that 'there are major geographical areas in which [the Lynx] is no longer viable but once was,'" particularly in the Northeast and Southern Rockies. Id. Accordingly, the Court "set aside" and "remanded for consideration and explanation" the FWS's specific determination that "'[c]ollectively, the Northeast, Great Lakes, and Southern Rockies do not constitute a significant portion of the range of the DPS.'" 239 F. Supp. 2d at 21 (internal citation omitted); see also Lynx III, Dec. 26, 2002 Order at 1-2 ("Order[ing]" that "Defendants' determination that '[c]ollectively, the Northeast, Great Lakes, and Southern Rockies do not constitute a significant portion of the range of the DPS,' is set aside and remanded for further consideration of the Lynx's status under the ESA consistent with the analysis set forth in the accompanying Memorandum Opinion.").

11. In March 2003, the FWS published a Federal Register Notice stating that, "[a]s directed by the Court, we are re-evaluating th[e] determination" that "'[c]ollectively, the Northeast, Great Lakes and Southern Rockies do not constitute a significant portion of the range of the DPS.'" 68 Fed. Reg. 12612 (March 17, 2003); see also 2003 Lynx A.R. at 134. Accordingly, the Service "reopen[ed] the comment period on our determination concerning the significant portion of the range of the lynx," and stated that, "[i]n particular, we are seeking comment on – (1) [t]he quantity of lynx habitat and (2) the quality of lynx habitat." Id. In response, plaintiffs and many others submitted comments and scientific information reinforcing the biological and geographical importance of the three Lynx regions deemed "not[] significant" by the Service. See 2003 Lynx A.R. at 3047-49 (National Wildlife Federation); id. at 3453 (Biodiversity Conservation Alliance); id. at 3054 (Defenders of Wildlife).

12. On July 3, 2003, the FWS published in the Federal Register a "Clarification of

Findings" and "Notice of Remanded Determination of Status for the Contiguous United States Distinct Population of the Canada Lynx." 68 Fed. Reg. 40075. The Service's new Notice contains another lengthy discussion of the threats facing the Lynx in the contiguous U.S. and the applicability of the section 4 listing "factors," id. at 40084-98, but never addressed the specific issue remanded by the Court. While recognizing that the "only portion of our March 24, 2000 final listing determination that the court remanded for further consideration was our determination that '[c]ollectively, the Northeast, Great Lakes and Southern Rockies do not constitute a significant portion of the range of the DPS,'" 68 Fed. Reg. 40080, the July 2003 Notice never actually addresses whether the Northeast, Great Lakes, and the Southern Rockies do, in fact, "constitute a significant portion of the range of the lynx" in the contiguous U.S.

13. Instead of addressing the issue remanded by the Court, the new finding addresses a different issue, i.e., whether the Lynx is "in danger of extinction throughout a significant portion of its range within the Northeast, Great Lakes, or Southern Rockies . . .." Id. at 40101. The FWS had not solicited public comment on that issue, and, in the new Notice, advised the public that comments that had been received on the "status of the lynx throughout the U.S DPS (i.e., endangered, threatened, or neither)" were "not the subject of this notice or are beyond the scope of the court's remand." Id. at 40080.

14. As to the issue the July 2003 Notice did address, the FWS declared that the Lynx is not "in danger of extinction throughout a significant portion of its range within the Northeast, Great Lakes, or Southern Rockies," 68 Fed. Reg. at 40101, although the Service, in its March 2000 listing determination, had found that Lynx were so severely depleted in these same regions that they do "not contribute substantially to the persistence of the contiguous United States DPS," 65 Fed. Reg. 16061.

15. The new Notice refers to many threats faced by Lynx in the three populations previously described by the Service as unable even to "contribute" to the survival of Lynx in the contiguous U.S. The Notice acknowledges that "natural fire plays a significant role in creating the mosaic of vegetation patterns, forest stand ages and structure that provide good lynx and snowshoe hare habitat," and hence that "increased interest in fire suppression and reduction of heavy fuels has the potential to affect snowshoe hare habitat" and hence greatly harm Lynx, which depend on snowshoe hare for their survival. 68 Fed. Reg. at 40094. The Notice characterizes the threat to Lynx from these activities as "currently low," id., but contains no analysis of how Lynx will be affected by the logging, road building, and related activities that will result from the Bush Administration's implementation of the National Fire Plan.

16. With regard to Lynx in the Northeast, the Notice acknowledges that "lynx habitat is supported almost entirely on a non-Federal land base[], predominantly commercial forest lands," and that the "quantity of lynx habitat in Maine is expected to decline." Id. (emphasis added). Yet the Notice characterizes the "threat to lynx in the Northeast because of timber harvest and associated activities" as only "moderate," while also conceding that "we do not know if future timber harvest practices will continue to provide conditions that are capable of supporting snowshoe hare densities." Id.

17. The July 2003 Notice acknowledges that Lynx may have already been eliminated from large parts of its historic range, including in Colorado, New Hampshire, New York, and Wyoming. Id. at 40087, 40090, 40091. Yet the Service again refused to list the species as endangered in the contiguous U.S. on the grounds that Lynx in the Northeast and Great Lakes "are not in danger of extinction," 68 Fed. Reg. 40100, and that, although the Lynx does "face[] possible extirpation" in the "Southern Rocky Mountains," this entire region – which

encompasses the Lynx's range in Colorado and Southern Wyoming and represents the southernmost population of Lynx in the world – "do[es] not constitute a significant portion of the range of the lynx." Id.

18. By letter dated March 11, 2004, as required by the ESA's citizen suit provision, 16 U.S.C. § 1540(g), plaintiffs provided defendants with formal notice that their latest refusal to list the Lynx as endangered violated the ESA. See Exh. 1. Plaintiffs pointed out that the new Notice "never squarely answers the specific issue remanded by the Court," id. at 3, and that "even the 'new' evidence discussed in the finding underscores the tenuous status of the Lynx throughout much, if not all, of its range in the U.S." Id.

19. Plaintiffs' formal notice letter also explained that the new finding is "expressly and repeatedly based on the proposition that the Forest Service and BLM will modify their activities and land management plans to be consistent" with a "Lynx Conservation Assessment and Strategy" ("LCAS") approved in 2000. Id. at 6; see 68 Fed. Reg. 40093, 40096 (asserting that the USFS and BLM will "abide" by the LCAS and that the "LCAS was developed to provide a consistent and effective approach to conserving Lynx on Federal lands"). Plaintiffs explained that, "even years after the listing decision, '[m]ost Federal land management plans have yet to be amended to provide long-term conservation for lynx,'" and that the USFS and BLM are, in fact, refusing to abide by the LCAS in making decisions concerning logging, road construction, mining, grazing, snowmobile use, and oil and gas exploration, among many "other harmful activities," in Lynx habitat. Exh. 1 at 7.

20. Plaintiffs' formal notice letter also explained that the USFS and BLM were refusing to comply with the LCAS in carrying out "fire management" activities, and that this harm to the Lynx was compounded by adoption of the Self-Consultation Regulation, which "effectively

eliminat[ed] the section 7 consultation protections with regard to a host of potentially harmful activities in Lynx habitat." Exh. 1 at 9.

21. Plaintiffs have received no response to their formal notice letter from either defendants or their counsel.

22. In August 2000, President Clinton asked the Secretaries of the Interior and Agriculture to prepare a report recommending how best to reduce the impacts of that year's severe "wildland fires on rural communities, and ensure sufficient firefighting resources in the future." Managing the Impact of Wildfires on Communities and the Environment 1 (Sept. 8, 2000), Fish and Wildlife Service Counterpart Regulation Administrative Record ("FWS CR A.R., Vol. 10 at S16).

23. On September 8, 2000, the Secretaries provided a "Report to the President In Response to the Wildfires of 2000" that made a number of general recommendations for how to reduce the adverse impacts of catastrophic wildfires, including more effective "firefighting management and preparedness," id. at S27, and "local community coordination and outreach." Id. at S31. The Report stated that "[n]otably, the Administration's wildland fire policy does not rely on commercial logging or new road building to reduce fire risks and can be implemented under its current forest and land management policies." Id. at S26 (emphasis added). With regard to the importance of maintaining roadless areas in national forests, the Report stated that "[f]ires are almost twice as likely to occur in roaded areas as they are in roadless areas." Id. at S27.

24. The Clinton Administration Report did not suggest that compliance with environmental laws, or opportunities for judicial review, had in any way hampered efforts to combat severe wildfires. Rather, the Report stressed that "timber sales" and other activities

"should proceed only after all environmental laws and procedures are followed," and that timber "[r]emoval activities that do not comply with environmental requirements can add to the damage associated with fire-impacted landscapes." Id. at S35 (emphasis added).

25. In a speech on August 22, 2002, President Bush announced a "Healthy Forest Initiative" based on the proposition that it "makes sense to clear brush," and that unidentified "[p]eople" are "using litigation to keep the United States of America from enacting common sense forest policy." FWS CR A.R., Vol. 10, at S53. The accompanying policy – called "Healthy Forests: An Initiative for Wildlife Prevention and Stronger Communities," id. at S59 – "call[ed] for more active forest and rangeland management" on 190 million acres of public lands, and was based on the premise, as articulated in the President's speech, that "needless red tape and lawsuits delay effective implementation" of projects that the Administration seeks to pursue on federal lands, including "[t]imber sales to achieve fuels reduction" and other methods of "thinning [] forests." Id. at S61, S68, S72.

26. According to the "Healthy Forests Initiative," timber sales and other "vital projects are often significantly delayed and constrained by procedural delays and litigation," id. at S72, including the awarding of "injunctive relief to litigants based on short-term grounds, without deference to expert assessments of long-term risks to property . . .." Id. at S74. The Initiative specifically asserted that "fuels reduction projects" such as timber sales are "often delayed or prevented due to litigation over Endangered Species Act requirements," id. at S65, but pointed to no specific instances of when the consultation process required by section 7 of the ESA had delayed any needed project. The Initiative stated that President Bush was "directing" defendant Gale Norton and other Administration officials to "[r]educe . . . environmental reviews" and to take action to "allow timber projects to proceed without delay . . .." Id. at S62.

27. As directed by the President, on June 5, 2003, the FWS and NMFS, along with the Forest Service, BLM, and several other agencies, published a Federal Register Notice proposing regulations that, "[a]s part of the President's Healthy Forests Initiative," would largely eliminate the requirement for section 7 consultation with the FWS or NMFS regarding projects that would "support the National Fire Plan" ("NFP"). 68 Fed. Reg. 33806, FWS CR A.R., Vol. 3, at F100-107. The proposed regulation defined the NFP as the "September 8, 2000 report to the President from the Departments of the Interior and Agriculture . . . together with the accompanying budget requests, strategies, plans, and direction, or any amendments thereto." 68 Fed. Reg. 33811. The proposal did not delineate which "budget requests," "strategies," "plans," "direction" and "amendments" for which the Administration was proposing to bypass consultation.

28. In the June 2003 Notice, defendants specifically proposed to "eliminate the need to conduct informal consultation and eliminate the requirement to obtain written concurrence from the Service for those NFP actions that the Action Agency determines are 'not likely to adversely affect' (NLAA) any listed species or designated critical habitat." 68 Fed. Reg. 33806. The proposal stated that this "alternative consultation process" would apply to all "agency projects that authorize, fund, or carry out actions that support the NFP," including "thinning and removal of fuels to prescribed objectives" and "road maintenance and operation activities." 68 Fed. Reg. 33807.

29. According to the preamble to the proposal, "[u]sing the existing consultation process, the Action Agencies have consulted with the Service on many thousands of proposed actions that ultimately received written concurrence from the Service for NLAA determinations," and the "concurrence process for such projects has . . . caused delays." 68 Fed. Reg. 33808. The Federal Register Notice did not set forth any evidence documenting NFP (or any other) projects that have

been "delayed" because of the need to obtain concurrences from the Services. The Notice did not discuss the circumstances under which the FWS or NMFS has disagreed with NLAA determinations by action agencies in the past, or the extent to which the Services' reviews have resulted in project changes or mitigation measures that have improved conditions for listed species. Id. at 33809.

30. The proposal was greeted with overwhelming opposition by conservation organizations and others, including federal defendants' own regional directors. The FWS's Regional Director in Albuquerque, New Mexico stated that

> Section 7(a)(2) requires every Federal agency, *in consultation with and with the assistance of the Secretary*, to insure that any action authorized, funded, or carried out by the agency is not likely to jeopardize the continued existence or any listed species, or result in the destruction or adverse modification of critical habitat. The key to [this] paragraph[] is that [it is] carried out in consultation with the assistance of the Service. We serve as an outside and independent agency to review projects, and use our biological knowledge and experience with similar activities to assist in developing appropriate measures that will minimize effects . . . The counterpart regulations as proposed will diminish the Service's role in Section 7 consultation.

FWS CR A.R., Vol. 6, at K391 (italics in original). The Regional Director further explained that, in addition to their lack of "independen[ce]" from timber sales or other potentially harmful projects, action agencies like the Forest Service and BLM

> do not have the range-wide information on species status, knowledge of past consultations with other Federal agencies that have evaluated project effects on species, or a broad view of threats faced by the species throughout its range. Thus, the action agencies would have a difficult time assessing the effects of their actions in the appropriate context.

Id. at K392.

31. The FWS's Regional Director in New Mexico also took issue with the proposal's unsupported rationale that the elimination of consultation with the FWS was needed to expedite necessary projects:

> Funding through the NFP has enabled the [FWS] to hire and dedicate many biologists in order to expedite consultations related to the NFP. Funding these positions has successfully streamlined and expedited fire-related consultations, while allowing the Service to continue its assistance to agencies implementing these projects. Thus, informal consultations are generally completed within 30 days or less. . . . Considering the other regulatory processes (such as the National Environmental Policy Act, consultation with the State Historic Preservation Office, and Native American consultation), these regulations are unlikely to reduce the time frame for decisions.

Id. at K391. The Regional Director also criticized the proposal's failure to "provide definitions of key terms" and urged that

> clear definitions of what projects would fall under the NFP and could be considered under the counterpart regulations be added to the document. This would ensure that the process would not be incorrectly applied to projects that are not designed to achieve the objectives of the NFP and Healthy Forests Initiative.

Id. at K393.

32. The FWS's Regional Director of Region 5 in Hadley, Massachusetts, stated that "we have significant concerns about the regulation as proposed," FWS CR A.R., Vol. 6, at K414, including because the "basic design of this regulation as proposed is based on flawed premises and is unlikely to achieve any net efficiencies in processing time for [not likely to adversely affect determinations]," and because "Action Agencies will be challenged to maintain biological objectivity in light of differences in primary agency missions." Id. at K416.

33. The FWS's Regional Director in Portland, Oregon, along with the Manager of the Service's California/Nevada Operations Office described the "important role of the informal consultation process in the conservation of listed species and the ecosystems upon which they depend," as well as the "likelihood of adverse effects to listed species and critical habitats caused by these types of actions," i.e., logging operations, road building, and other "fuel treatment actions." FWS CR A.R., Vol. 6, at K383, K384. These officials also noted that the Services and action agencies had already adopted "formalized streamlined consultation procedures" that

allowed any necessary wildfire projects to move forward rapidly without sacrificing the species protections afforded by the consultation process. Id. at K384.

34. Defendants received more than 50,000 public comments on the proposed rule, the vast majority of which urged the Administration to jettison the proposal. See FWS CR A.R., Vol. 3, at F42. Plaintiffs and many other conservation organizations, scientists, and concerned citizens urged defendants not to adopt the proposed rule for many reasons, including because of its deleterious effects on the Lynx and other listed species greatly affected by logging, fire suppression, and related activities. Plaintiffs Defenders of Wildlife, American Lands Alliance, and Northwest Ecosystem Alliance, along with the Natural Resources Defense Council, National Wildlife Federation, and the Endangered Species Coalition advised the FWS that the proposal "would make several patently unlawful and unwarranted changes to regulations implementing a bedrock provision of this country's most important wildlife protection law – section 7(a)(2)" of the ESA. FWS CR A.R., Vol. 6, at K149. The conservation groups explained that the proposal "would not only eliminate section 7 consultation with the Services altogether on possibly thousands of NFP projects posing serious risks to endangered and threatened species," but "would also establish a dangerous precedent for further weakening of the ESA," since the proposal's rationale for eliminating informal consultation on NFP projects could just as easily be applied to other agencies and activities. Id.

35. Plaintiffs' comments pointed out that the FWS annually "reviews more than 72,000 federal actions through the section 7 consultation process and of this total, approximately 93% are resolved through informal consultation . . . Thus, if the section 7 changes proposed by the Bush Administration regarding NFP projects were applied to all federal agency actions, approximately 67,000 federal actions that are currently required to undergo section 7 consultation

each year because they pose some risk to endangered or threatened species, would escape consultation and the expert scrutiny of the Services entirely." FWS CR A.R., Vol. 6, at K150

36. In their August 4, 2003 comment letter, plaintiffs also explained that the "[A]dministration has failed to offer any empirical evidence" demonstrating that needed projects have been unnecessarily delayed by consultations under the ESA or other environmental reviews. Id. at K150. Plaintiffs further pointed out that the July 2003 Notice had ignored reports by the General Accounting Office and others demonstrating that the vast majority of NFP-related projects had been subject to rapid consultation and other environmental reviews and appeals. Id.

37. On September 30, 2003, the FWS and NMFS issued a six-page Environmental Assessment regarding the proposed Self-Consultation Regulation, which asserted that the regulations "would not have any environmental effects," Environmental Assessment for the Healthy Forests Initiative Counterpart Regulations, at 5 (Sept. 30, 2003), FWS CR A.R., Vol. 4, at G180 (emphasis added). While asserting that the "Action Agency will reach the same NLAA determination that the Services would reach, therefore exactly the same projects would proceed under the counterpart rule as under the current section 7 process," id., the EA made no mention of the views of the FWS's own Regional Directors that the Services' involvement has actually played a vital role in safeguarding imperilled species, and contained no independent analysis of the circumstances under which the FWS and NMFS have disagreed with action agencies' NLAA determinations in the past, or the extent to which USFS and BLM projects have been modified, as a consequence of the consultation process, to enhance the conservation of listed species.

38. The September 30, 2003 EA asserted that the "goal of the proposed counterpart regulations is to accelerate the process of approving NFP projects by reducing the time and effort needed to conduct a consultation for a NFP activity," but the EA provided no empirical evidence

that consultation with the FWS or NMFS has inappropriately delayed any necessary NFP projects. Id. at G182. The EA instead acknowledged that there are "streamlining processes" already in place that "work well," and that allow "established timelines [to] be met" without any changes in the consultation regulations. Id. at G183. The EA also pointed to no evidence that informal consultations on NFP projects has prevented Service biologists from completing formal consultations in a timely manner on such projects.

39. On October 9, 2003, defendants published a Federal Register Notice that "reopen[ed] the comment period to allow all interested parties to comment simultaneously on the proposed rule and the associated Environmental Assessment." 68 Fed. Reg. 58298. In response, conservation organizations again urged defendants not to adopt the proposed rule, and also pointed out patent inadequacies in the flimsy EA and urged defendants to prepare a full EIS on the proposed rule change. See, e.g., FWS CR A.R., Vol. 6, at K15 (comments of Southern Environmental Law Center); id. at K21 (comments of Idaho Conservation League).

40. On December 8, 2003, without first issuing an EIS or making any changes to the EA, defendants published their final rule "codify[ing] joint counterpart regulations for consultation under section 7." 68 Fed. Reg. 68254, FWS CR A.R., Vol. 4, at H81-92. The final rule, which was "virtually identical to the proposed rule," id. at H140 (e-mail from Interior Department official Ann Klee), "establishes a process by which an Action Agency may determine that a proposed Fire Plan Project is not likely to adversely affect any listed species or designated critical habitat without conducting formal or informal consultation or obtaining written concurrence from the Service." 68 Fed. Reg. 68264. The Regulation simply states that a "Fire Plan Project is an action determined by the Action Agency to be within the scope of the NFP as defined by this section," id., and allows no opportunity for the FWS or NMFS even to review a decision by the

action agency to invoke the self-consultation process.

41. The Regulation defines the NFP as the "September 8, 2000, report to the President from the Departments of the Interior and Agriculture . . . outlining a new approach to managing fires, together with the accompanying budget requests, strategies, plans, and direction, or any amendments thereto," but, as in the proposed rule, the final rule does not delineate which specific "budget requests, strategies, plans," "direction[s]" and "amendments" are covered by the new Regulation. Id. (emphasis added). These "budget requests, strategies, plans," directions," and "amendments" are not in the Administrative Record because they were not considered by the agency decisionmakers before the Regulation was adopted. See Exh. 2 at 2.

42. The preamble to the Regulation states that the "definition [of NFP project] is broad," and that the action agency has the "ultimate[]" responsibility to determine which of its projects will be exempted from consultation with the FWS. Id. at 68259.

43. The Regulation "permit[s] an Action Agency to enter into an Alternative Consultation Agreement ('ACA') with the Service . . . which will allow the Action Agency to determine that a Fire Plan Project is 'not likely to adversely affect' (NLAA) a listed species or designated critical habitat without formal or informal consultation with the Service or written concurrence from the Service. An NLAA determination for a Fire Plan Project made under an ACA . . . completes the Action Agency's statutory obligation to consult with the Service for that Project." 68 Fed. Reg. 68264. The preamble to the Regulation acknowledges that it will allow action agencies to avoid any consultation with the FWS with regard to many land-disturbing projects that may affect the Lynx and other listed species and their critical habitats, including "mechanical fuels treatments (thinning and removal of fuels to prescribed objectives)" and "road maintenance and operation activities." 68 Fed. Reg. 68255.

44. In response to comments that the "proposed rule has failed to offer any empirical evidence substantiating the claim that the regulatory obstacles have unnecessarily delayed active land management activities," the preamble to the final rule fails to furnish any such information. Id. at 68258. Instead, the preamble states that the "issue is not whether the regulatory process has delayed NFP projects" – which defendants said was the issue in the June 2003 proposal, see 68 Fed. Reg. 33808 – "but rather whether it can be streamlined so as to expedite the projects." Id.

45. Because defendants could not produce any evidence of past delays caused by consultation, the preamble instead asserted that the "Service[s] anticipate[] that the number of consultations requested for projects that implement the NFP will increase substantially in the future, as additional funding and effort is directed toward implementation of the NFP," id., and that "[w]ith the anticipated increase in fire plan projects, the concurrence process could cause delays." Id. at 68257. The preamble sets forth no data or analysis addressing the extent to which the number of requested consultations will "increase substantially in the future," or the extent to which any such speculated increase will be likely to "cause delays" in the approval of necessary projects. Nor did the preamble explain why streamlining efforts previously adopted – including those highlighted by the FWS's Regional Directors – would not be adequate to address the predicted upsurge in projects necessitating consultation.

46. In March 2004, the FWS and NMFS entered into "Alternative Consultation Agreements" with the USFS and BLM. Those agreements implement the new Regulation by specifically authorizing the Forest Service and BLM to avoid consultation with the Services for any projects that USFS and BLM themselves determine are (1) "within the scope of the NFP" and (2) are not likely to adversely affect any "listed threatened, endangered and proposed species" or any "designated and proposed critical habitat." See FWS CR A.R., Vol. 5, at J65

(ACA with Forest Service); id. at J73 (agreement with BLM). According to the signed Agreements, the Self-Consultation Agreements "may be used by any Forest Service [or BLM] biologist, botanist, or ecologist who conducts section 7 effects analyses for proposed actions that are Fire Plan projects" and has completed the "required training." Id. at J66, J74. The Agreements do not define what is meant by "Fire Plan Projects" covered by the Agreements, but, rather, provide that "Fire Plan Projects" "are actions determined by the Forest Service [or BLM] to be within the scope of the NFP, such as . . . mechanical fuels treatment (thinning and removal of fuels to prescribed objectives)" – i.e., logging – as well as "road maintenance and operation activities." Id. at J65, J73.

47. The Agreements provide that the "training program" for USFS and BLM employees who will use the Self-Consultation Regulation "will be delivered via a web based system,"and that the USFS and BLM will "annually" compile and provide the FWS and NMFS with a "list of NFP projects for which the counterpart consultation regulations were used." Id. at J68, J76. Based on these "lists," the signatories to the Agreements commit to a "monitoring program" "every three years following the first year" to review a "random sample" of NLAA decisions by the actions agencies, and "determine with a mutually agreed upon level of confidence that the Forest Service [or BLM] is making the determinations appropriately." Id.

48. According to the ACA's, the purpose of the monitoring program is simply to "evaluate whether the Forest Service [or BLM] demonstrated a rational connection between the . . . proposed action and NLAA determination." Id. at J69, J77. The Record reinforces that the "monitoring" is not designed to "evaluate whether the Action Agency made the same determination the Service would have made on a project, but, instead, evaluates whether they ma[de] a rational connection between the information and the NLAA determination." FWS CR

A.R., Vol. 5, at I113 (2/12/04 e-mail from FWS official). The Record also reflects that defendants will be satisfied if the "Action Agency is making 95% of their determinations accurately." Id. at I124 (2/12/04 e-mail from FWS official); see also id. at I47 ("We want to be almost 100 percent sure that the Action Agency is making the determinations correctly 95% of the time.").

49. The ASA's prescribe no particular consequences that must flow from the triennial "monitoring" of a "sample" of self-consultation decisions and, in particular, do not provide that even patently erroneous NLAA determinations may be reversed by the monitoring "Team," which must include representatives of the action agencies. Even if the "Team" finds that "several determinations made for a fuel treatment project were not made consistent with the best available scientific" information, the ASA's provide only that the "Team may recommend further focused review of determinations for similar types of projects." Id. at J69, J77.

50. Following the signing of the ACAs, defendants developed a "web-based training course" that, according to a May 2004 BLM memorandum, "should take about an hour" to complete by BLM or USFS employees seeking to engage in self-consultation. BLM CR A.R. at 42. Id. In providing for the "training," USFS and BLM also advised their employees that "[u]nder the counterpart regulations, the action agency's responsibility to do [an] effects analysis and potentially make and document a NLAA determination . . . now becomes the final consultation requirement under the ESA." NMFS CR A.R., Vol. 4, at Enclosure 3.

51. Following the one hour "training" course, Forest Service and BLM employees are authorized to make "final consultation" decisions under the ESA once they pass an on-line exam that consists of 68 generic multiple choice and true/false questions, such as "Question 9": "The action agencies employ large professional staffs of biologists, botanists, and ecologists. a) True

b) False," and "Question 10": "The concurrence process has used the Services [sic] limited resources that could be better used to do formal consultations. a) True b) False." NMFS CR A.R., Vol. 4, at Enclosure (May 4, 2004 Counterpart Regulations Certification Exam Module Q & As).

52. USFS and BLM employees have now taken the "training" course and passed the "exam" and are now using the counterpart regulations to avoid informal consultation with the FWS and/or NMFS regarding various NFP projects in the habitat of listed species, including in Lynx habitat. See Declaration of Andrew Hawley (Exh. 3) at ¶ 7. USFS and BLM will continue to invoke the Self-Consultation Regulation with regard to NFP projects in the habitat of listed species, including the Lynx. Id.

Respectfully submitted,

/s/_____

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Attorney for Plaintiffs

Dated: May 3, 2005

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DEFENDERS OF WILDLIFE, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	
	)	Civ. No. 04-1230 (GK)
GALE NORTON, et al.,	)	
	)	
Defendants.	)	

ORDER

This matter is before the Court on the parties' cross-motions for summary judgment. On consideration of the parties' arguments and memoranda, as well as the entire record in the case, it is, by the Court, this ___ day of _____, 2005,

ORDERED that plaintiffs' motion for summary judgment is granted; and it is further

ORDERED that defendants' and defendant-intervenor's motions for summary judgment are denied; and it is further

ORDERED that it is declared by the Court that the United States Fish and Wildlife Service's ("FWS") July 3, 2003, "Clarification of Findings" and "Notice of Remanded Determination of Status for the Contiguous United States Distinct Population of the Canada Lynx," 68 Fed. Reg. 40075, are arbitrary, capricious, and contrary to law, including because the "Clarification of Findings" and "Notice" do not address the specific issue remanded by this Court on December 26, 2002, and hence they are set aside and remanded for further proceedings consistent with the Court's accompanying Memorandum Opinion; and it is further

ORDERED that the FWS shall submit for publication in the Federal Register, by no later than 180 days from the date of this Order, a new "Notice of Remanded Determination" that complies with the Court's December 26, 2002 ruling, and is otherwise consistent with the accompanying Memorandum Opinion; and it is further

ORDERED that it is declared that defendants' "Joint Counterpart Endangered Species Act Section 7 Consultation Regulations," published on December 8, 2003, 68 Fed. Reg. 68254, and the accompanying "Alternative Consultation Agreements" entered into by the FWS, National Marine Fisheries Services, Bureau of Land Management, and United States Forest Service, in March 2004, are arbitrary, capricious, and contrary to law, and hence are set aside; and it is further

ORDERED that defendants shall engage in consultation, in accordance with the process set forth in 50 C.F.R. Part 402, with regard to any projects that were exempted from that process by virtue of the "Joint Counterpart Regulations" and "Alternative Consultation Agreements."

_____

U.S. District Judge

C. FACTS PERTAINING TO DEFENDANTS' ADOPTION OF THE SELF-CONSULTATION SECTION 7 REGULATION

1. The Bush Administration's "Healthy Forests Initiative" And Subsequent Proposal To Eliminate Section 7 Consultations For The First Time In The History of the Endangered Species Act

In August 2000, President Clinton asked the Secretaries of the Interior and Agriculture to prepare a report recommending how best to reduce the impacts of that year's severe "wildland fires on rural communities, and ensure sufficient firefighting resources in the future." Managing the Impact of Wildfires on Communities and the Environment 1 (Sept. 8, 2000), Fish and Wildlife Service Counterpart Regulation Administrative Record ("FWS CR A.R., Vol. 10 at S16).[7]

On September 8, 2000, the Secretaries provided a "Report to the President In Response to the Wildfires of 2000" that made a number of general recommendations for how to reduce the adverse impacts of catastrophic wildfires, including more effective "firefighting management and preparedness," id. at S27, and "local community coordination and outreach." Id. at S31. The Report stated that "[n]otably, the Administration's wildland fire policy does not rely on commercial logging or new road building to reduce fire risks and can be implemented under its current forest and land

[7] The government has filed several separate Administrative Records pertaining to the Self-Consultation Regulation. The FWS Record initially filed with the Court consisted of 8 volumes, but omitted many pertinent documents. See Defendants' April 22, 2004 Notice of Filing Supplemental Administrative Record of the United States Fish and Wildlife Service for Joint Counterpart Endangered Species Act Consultation Regulations. Accordingly, at plaintiffs' request, the FWS filed a new Record that now consists of 13 volumes and will be cited as "FWS CR A.R., Vol. __, at __." The Administrative Record submitted by NMFS, which consists of four volumes, will be cited as "NMFS CR A.R., Vol. __, at __." The BLM – which cooperated in the issuance of the regulations and signed an agreement implementing the regulations – has filed its own "Supplemental Administrative Record" pertaining to the regulations. That Record will be cited as "BLM CR A.R., Vol. _, at __." Finally, the USFS – the other action agency that is now implementing the regulations – has represented that all of its pertinent records are included within the Administrative Records submitted by the FWS and NMFS. See Defendants' April 22, 2004 Notice of Filing Declaration of Marc Bosch.

management policies." Id. at S26 (emphasis added). Indeed, with regard to the importance of maintaining roadless areas in national forests, the Report stated that "[f]ires are almost twice as likely to occur in roaded areas as they are in roadless areas." Id. at S27. Moreover, the Clinton Administration Report did not suggest that compliance with environmental laws, or opportunities for judicial review, had in any way hampered efforts to combat severe wildfires. To the contrary, the Report stressed that "timber sales" and other activities "should proceed only after all environmental laws and procedures are followed," and that timber "[r]emoval activities that do not comply with environmental requirements can add to the damage associated with fire-impacted landscapes." Id. at S35 (emphasis added).

In 2002, however, the Bush Administration announced a very different approach to addressing the issue of wildfires on public lands. In a speech on August 22, 2002, President Bush announced a "Healthy Forest Initiative" based on the proposition that it "makes sense to clear brush," and that unidentified "[p]eople" are "using litigation to keep the United States of America from enacting common sense forest policy." FWS CR A.R., Vol. 10, at S53. The accompanying policy – called "Healthy Forests: An Initiative for Wildlife Prevention and Stronger Communities," id. at S59 – "call[ed] for more active forest and rangeland management" on 190 million acres of public lands, and was based on the premise, as articulated in the President's speech, that "needless red tape and lawsuits delay effective implementation" of projects that the Administration seeks to pursue on federal lands, including – in sharp contrast to the Clinton Administration Report – "[t]imber sales to achieve fuels reduction" and other methods of "thinning [] forests." Id. at S61, S68, S72 (emphasis added).

According to the "Healthy Forests Initiative," timber sales and other "vital projects are often

significantly delayed and constrained by procedural delays and litigation," id. at S72, including the awarding of "injunctive relief to litigants based on short-term grounds, without deference to expert assessments of long-term risks to property . . .." Id. at S74. The Initiative specifically asserted that "fuels reduction projects" such as timber sales are "often delayed or prevented due to litigation over Endangered Species Act requirements," id. at S65 (emphasis added), but pointed to no specific instances of when the consultation process required by section 7 of the ESA had delayed any needed project. Nonetheless, the Initiative stated that President Bush was "directing" defendant Gale Norton and other Administration officials to "[r]educe . . . environmental reviews" and to take action to "allow timber projects to proceed without delay . . .." Id. at S62.

As directed by the President, on June 5, 2003, the FWS and NMFS, along with the Forest Service, BLM, and several other agencies, published a Federal Register Notice proposing regulations that, "[a]s part of the President's Healthy Forests Initiative," would largely eliminate – for the first time in the history of the ESA – the requirement for section 7 consultation with the FWS or NMFS regarding projects that would "support the National Fire Plan" ("NFP"). 68 Fed. Reg. 33806, FWS CR A.R., Vol. 3, at F100-107. The proposed regulation defined the NFP as the "September 8, 2000 report to the President from the Departments of the Interior and Agriculture . . . together with the accompanying budget requests, strategies, plans, and direction, or any amendments thereto." 68 Fed. Reg. 33811. The proposal did not delineate which "budget requests," "strategies," "plans," "direction" and "amendments" for which the Administration was proposing to bypass consultation.

In the June 2003 Notice, defendants specifically proposed to "eliminate the need to conduct informal consultation and eliminate the requirement to obtain written concurrence from the Service for those NFP actions that the Action Agency determines are 'not likely to adversely affect' (NLAA)

any listed species or designated critical habitat." 68 Fed. Reg. 33806 (emphasis added). The proposal stated that this "alternative consultation process" – under which there would actually be no "consultation" at all with the Services whenever the action agency decided that its own project was not likely to harm a listed species or critical habitat – would apply to all "agency projects that authorize, fund, or carry out actions that support the NFP," including "thinning and removal of fuels to prescribed objectives" – i.e., logging operations – and "road maintenance and operation activities." Id. at 33806-07.

According to the preamble to the proposal, "[u]sing the existing consultation process, the Action Agencies have consulted with the Service on many thousands of proposed actions that ultimately received written concurrence from the Service for NLAA determinations," and the "concurrence process for such projects has . . . caused delays." 68 Fed. Reg. 33808 (emphasis added). The Federal Register Notice, however, did not set forth any evidence documenting NFP (or any other) projects that have been "delayed" because of the need to obtain concurrences from the Services. While asserting that it is defendants' "expectation that the Action Agency will reach the same conclusions as the Service" as to which timber sales and other projects are likely to adversely affect listed species – and hence require formal consultation – the Notice also did not discuss the circumstances under which the FWS or NMFS has disagreed with NLAA determinations by action agencies in the past, or the extent to which the Services' reviews have resulted in project changes or mitigation measures that have improved conditions for listed species. Id. at 33809.

This proposal was greeted with overwhelming opposition by conservation organizations and others, including federal defendants' own regional directors. For example, the FWS's Regional Director in Albuquerque, New Mexico, made clear that the proposal conflicts with the letter and

purpose of section 7 of the ESA because:

> Section 7(a)(2) requires every Federal agency, *in consultation with and with the assistance of the Secretary*, to insure that any action authorized, funded, or carried out by the agency is not likely to jeopardize the continued existence or any listed species, or result in the destruction or adverse modification of critical habitat. The key to [this] paragraph[] is that [it is] carried out in consultation with the assistance of the Service. We serve as an outside and independent agency to review projects, and use our biological knowledge and experience with similar activities to assist in developing appropriate measures that will minimize effects . . . The counterpart regulations as proposed will diminish the Service's role in Section 7 consultation.

FWS CR A.R., Vol. 6, at K391 (italics in original, other emphasis added). The Regional Director further explained that, in addition to their lack of "independen[ce]" from timber sales or other potentially harmful projects, action agencies like the Forest Service and BLM

> do not have the range-wide information on species status, knowledge of past consultations with other Federal agencies that have evaluated project effects on species, or a broad view of threats faced by the species throughout its range. Thus, the action agencies would have a difficult time assessing the effects of their actions in the appropriate context.

Id. at K392 (emphasis added).

The FWS's Region 2 Director also criticized the proposal's failure to "provide definitions of key terms" – such as "what projects would fall under the NFP," id. at K393 – and took issue with the proposal's unsupported rationale that the elimination of consultation with the FWS was needed to expedite necessary projects:

> Funding through the NFP has enabled the [FWS] to hire and dedicate many biologists in order to expedite consultations related to the NFP. Funding these positions has successfully streamlined and expedited fire-related consultations, while allowing the Service to continue its assistance to agencies implementing these projects. Thus, informal consultations are generally completed within 30 days or less. . . . Considering the other regulatory processes (such as the National Environmental Policy Act, consultation with the State Historic Preservation Office, and Native American consultation), these regulations are unlikely to reduce the time frame for decisions.

Id. at K391 (emphasis added).

These concerns were echoed by other Regional Directors and offices. The FWS's Regional Director of Region 5 in Massachusetts, stated that "we have significant concerns about the regulation as proposed," FWS CR A.R., Vol. 6, at K414, including because the "basic design of this regulation as proposed is based on flawed premises and is unlikely to achieve any net efficiencies in processing time for [not likely to adversely affect determinations]," and because "Action Agencies will be challenged to maintain biological objectivity in light of differences in primary agency missions." Id. at K416 (emphasis added); see also id. ("[W]ildlife biology applied in the context of the ESA is a highly specialized field in which no other agency has equivalent expertise . . . The Service's expertise is constantly evolving based on assimilation of new information by Service biologists.").[8]

Defendants also received more than 50,000 public comments on the proposed rule, the vast majority of which urged the Administration to jettison the proposal. See FWS CR A.R., Vol. 3, at F42.[9] Plaintiffs and many other conservation organizations, scientists, and concerned citizens urged defendants not to adopt the proposed rule for many reasons, including because of its deleterious

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[8] Likewise, the FWS's Regional Director in Portland, Oregon, along with the Manager of the Service's California/Nevada Operations Office described the "important role of the informal consultation process in the conservation of listed species and the ecosystems upon which they depend," as well as the "likelihood of adverse effects to listed species and critical habitats caused by these types of actions," i.e., logging operations, road building, and other "fuel treatment actions." FWS CR A.R., Vol. 6, at K383, K384. These officials also noted that the Services and action agencies had already adopted "formalized streamlined consultation procedures" that allowed any necessary wildfire projects to move forward rapidly without sacrificing the species protections afforded by the consultation process. Id. at K384.

[9] As part of the Administrative Record, defendants have provided a CD-Rom containing what defendants have characterized as "non-substantive email comments from the public." April 1, 2005 Letter from Mark A. Brown (attached as Exh. 2), at 3. According to defendants, "[d]ue to the volume of these comments," no "detailed index" of them has been prepared, but the government has acknowledged that the "majority of these comments were in opposition to the proposed counterpart regulations." Id.

effects on the Lynx and other listed species greatly affected by logging, fire suppression, and related activities. Plaintiffs Defenders of Wildlife, American Lands Alliance, and Northwest Ecosystem Alliance, along with the Natural Resources Defense Council, National Wildlife Federation, and the Endangered Species Coalition advised the FWS that the proposal "would make several patently unlawful and unwarranted changes to regulations implementing a bedrock provision of this country's most important wildlife protection law – section 7(a)(2)" of the ESA. FWS CR A.R., Vol. 6, at K149. The conservation groups explained that the proposal "would not only eliminate section 7 consultation with the Services altogether on possibly thousands of NFP projects posing serious risks to endangered and threatened species," but "would also establish a dangerous precedent for further weakening of the ESA," since the proposal's rationale for eliminating informal consultation on NFP projects could just as easily be applied to other agencies and activities. Id.[10]

In their August 4, 2003 comment letter, plaintiffs also explained that the "[A]dministration has failed to offer any empirical evidence" demonstrating that needed projects have been unnecessarily delayed by consultations under the ESA or other environmental reviews. Id. at K150. Plaintiffs further pointed out that the July 2003 Notice had ignored reports by the General Accounting Office and others demonstrating that the vast majority of NFP-related projects had been

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[10] Plaintiffs' comments pointed out that the FWS annually "reviews more than 72,000 federal actions through the section 7 consultation process and of this total, approximately 93% are resolved through informal consultation . . . Thus, if the section 7 changes proposed by the Bush Administration regarding NFP projects were applied to all federal agency actions, approximately 67,000 federal actions that are currently required to undergo section 7 consultation each year because they pose some risk to endangered or threatened species, would escape consultation and the expert scrutiny of the Services entirely." FWS CR A.R., Vol. 6, at K150 (emphasis in original). This scenario is far from fanciful since, as explained below, the precedent established by the Self-Consultation Regulation is already being extended to other activities and programs. See infra at n. 29.

subject to rapid consultation and other environmental reviews and appeals. Id.

2. Defendants' Cursory Environmental Assessment On The Regulation

On September 30, 2003, the FWS and NMFS issued a six-page Environmental Assessment regarding the proposed Self-Consultation Regulation, which asserted that the regulations "would not have any environmental effects," Environmental Assessment for the Healthy Forests Initiative Counterpart Regulations, at 5 (Sept. 30, 2003), FWS CR A.R., Vol. 4, at G180 (emphasis added). Thus, while asserting that the "Action Agency will reach the same NLAA determination that the Services would reach, therefore exactly the same projects would proceed under the counterpart rule as under the current section 7 process," id. (emphasis added), the EA made no mention of the views of the FWS's own Regional Directors that the Services' involvement has actually played a vital role in safeguarding imperilled species, see supra at 24, and, once again, contained no independent analysis of the circumstances under which the FWS and NMFS have disagreed with action agencies' NLAA determinations in the past, or the extent to which USFS and BLM projects have been modified, as a consequence of the consultation process, to enhance the conservation of listed species.

The September 30, 2003 EA also asserted that the "goal of the proposed counterpart regulations is to accelerate the process of approving NFP projects by reducing the time and effort needed to conduct a consultation for a NFP activity," but, once again, defendants did not provide any empirical evidence that consultation with the FWS or NMFS has inappropriately delayed any necessary NFP projects. Id. at G182. The EA instead flatly acknowledged that there are "streamlining processes" already in place that "work well," and that allow "established timelines [to] be met" without any changes in the consultation regulations. Id. at G183.

Nonetheless, according to the EA, even these "streamlined processes" "still encumber the

who will use the Self-Consultation Regulation "will be delivered via a web based system,"and that the USFS and BLM will "annually" compile and provide the FWS and NMFS with a "list of NFP projects for which the counterpart consultation regulations were used." Id. at J68, J76. Based on these "lists," the signatories to the Agreements commit to a "monitoring program" "every three years following the first year" to review a "random sample" of NLAA decisions by the actions agencies, and "determine with a mutually agreed upon level of confidence that the Forest Service [or BLM] is making the determinations appropriately." Id. (emphasis added).[13]

The ACA's prescribe no particular consequences that must flow from the triennial "monitoring" of a "sample" of self-consultation decisions and, in particular, do not provide that even patently erroneous NLAA determinations may be reversed by the monitoring "Team" (which itself must include representatives of the action agencies). Rather, even if the "Team" finds that "several determinations made for a fuel treatment project were not made consistent with the best available scientific" information, the ACA's merely provide that the "Team may recommend further focused review of determinations for similar types of projects." Id. at J69, J77 (emphasis added).

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[13] According to the ACA's, the purpose of the monitoring program is simply to "evaluate whether the Forest Service [or BLM] demonstrated a rational connection between the . . . proposed action and NLAA determination." Id. at J69, J77 (emphasis added). The Record further reinforces that the "monitoring" is not designed to "evaluate whether the Action Agency made the same determination the Service would have made on a project, but, instead, evaluates whether they ma[de] a rational connection between the information and the NLAA determination." FWS CR A.R., Vol. 5, at I113 (2/12/04 e-mail from FWS official) (emphasis added). And, even with regard to that minimal standard, the Record reflects that defendants will be satisfied if the "Action Agency is making 95% of their determinations accurately." Id. at I124 (2/12/04 e-mail from FWS official) (emphasis added). In other words, the self-consultation approach will evidently be deemed a success if the action agency makes the clearly wrong call on the adverse impacts to listed species or their critical habitat – and hence erroneously bypasses formal consultation – with regard to "only" 1 out of every 20 projects. See also id. at I47 ("We want to be almost 100 percent sure that the Action Agency is making the determinations correctly 95% of the time.").

Following the signing of the ACAs, defendants developed a "web-based training course" that, according to a May 2004 BLM memorandum, "should take about an hour" to complete by BLM or USFS employees seeking to engage in self-consultation. BLM CR A.R. at 42 (emphasis added). Id. In providing for the "training," USFS and BLM also advised their employees that "[u]nder the counterpart regulations, the action agency's responsibility to do [an] effects analysis and potentially make and document a NLAA determination . . . now becomes the final consultation requirement under the ESA." NMFS CR A.R., Vol. 4, at Enclosure 3 (emphasis added). Following the one hour "training" course, Forest Service and BLM employees are authorized to make these "final consultation" decisions under the ESA once they pass an on-line exam that consists of 68 generic multiple choice and true/false questions, such as "Question 9": "The action agencies employ large professional staffs of biologists, botanists, and ecologists. a) True b) False," and "Question 10": "The concurrence process has used the Services [sic] limited resources that could be better used to do formal consultations. a) True b) False." NMFS CR A.R., Vol. 4, at Enclosure (May 4, 2004 Counterpart Regulations Certification Exam Module Q & As).[14]

Forest Service and BLM employees have now taken the "training" course and passed the "exam" and, as set forth in the attached standing declarations, they are now using the counterpart regulations to routinely avoid any consultation with the FWS and/or NMFS regarding various timber cutting, road building, and other habitat-disturbing projects, including many such projects in the habitat of Lynx and other listed species as to which plaintiffs have concrete recreational,

[14] Incidentally, to pass the "exam," BLM and USFS employees must answer both questions as "True," NMFS CR A.R., Vol. 4, at Doc. 267, Attachment, although, as noted previously, the FWS's own Regional Directors do not believe it is the case that the Services' resources spent on informal consultations would be "better used to do formal consultations," or are diverting needed resources from formal consultations. See supra at 28.

professional, aesthetic and other interests.[15]

ARGUMENT

This case is brought under the ESA's citizen suit provision, 16 U.S.C. § 1540(g), and under the APA, 5 U.S.C. § 706(2). Under the APA's standard of review, an action must be set aside if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). In conducting its review under the APA, "a court must consider whether the agency acted within the scope of its legal authority, whether the agency adequately explained its decision, whether the agency based its decision on facts in the record, and whether the agency considered the relevant factors." Lynx III, 239 F. Supp. 2d at 17 (citing Marsh v. Oregon Natural Resources Council, 490 U.S. 360, 378 (1989)). In reviewing the agency's decision, the Court "may not supply a reasoned basis for the agency's action that the agency itself has not given," Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Auto. Ins. Co., 463 U.S. 29, 43 (1983) (internal citations omitted), and, "[i]f an agency fails to articulate a rational basis for its decision, it is appropriate to remand for reasoned decision-making." Lynx III, 239 F. Supp. 2d at 17-18. When these principles are applied here, it is clear that both the Self-Consultation Regulation and the FWS's July 2003 Notice on the Lynx listing issue must be set aside.

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[15] Indeed, as set forth in the accompanying Declarations plaintiffs are submitting to establish standing and that there is a ripe controversy concerning the Self-Consultation Regulation, the Regulation has already been employed to exempt from consultation more projects with potential impacts on Lynx habitat than projects affecting any other species. See Declaration of Andrew Hawley (Exh. 3) at ¶ 7; see also Declaration of David Werntz (Exh. 4); Declaration of Jym St. Pierre (Exh. 5); Declaration of Sara Mounsey (Exh. 6); Declaration of Bruce M. Pendery (Exh. 7); Declaration of Karlyn A. Berg (Exh. 8); Declaration of Amaroq Eden Weiss (Exh. 9); Declaration of Mark Skatrud (Exh. 10); Declaration of Todd Schulke (Exh. 11); Declaration of Susanne Stone (Exh. 12).

the APA, and in light of the "best available" scientific data. 16 U.S.C. § 1533(b)(1)(A).

II. THE SELF-CONSULTATION REGULATION IS CONTRARY TO THE ESA, THE APA, AND NEPA.

As discussed below, it is impossible to harmonize the Regulation with the plain language and legislative history of section 7 of the ESA, or with the overall design and purpose of the Act. Even if the Regulation could somehow be reconciled with the ESA, defendants have not proffered even a coherent rationale for dramatically changing their longstanding approach to compliance with section 7, let alone a rationale that is supported by evidence in the record. Finally, defendants' EA on the Regulation is woefully inadequate to discharge defendants' obligations under NEPA.

A. The Regulation Flagrantly Violates The ESA.

In determining whether the regulation violates the ESA, the Court applies the familiar two-part test of Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984). "Under Chevron's first step," the Court "ask[s] 'whether Congress has directly spoken to the precise question at issue,' for if 'the intent of Congress is clear, that is the end of the matter . . . [T]he court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.'" Nuclear Energy Inst. Inc. v. EPA, 373 F.3d 1251, 1269 (D.C. Cir. 2004) (quoting Chevron, 467 U.S. at 842-43). Only "[i]f the statute is 'silent or ambiguous with respect to the specific issue,'" does the Court "proceed to Chevron's second step, asking whether the agency's interpretation 'is based on a permissible construction of the statute.'" Nuclear Energy Institute, 373 F.3d at 1269 (quoting Chevron, 467 U.S. at 843).

Here, the Court need proceed no further than the first step of Chevron since, when the "statute's text, structure, legislative history, and purpose" are considered, it is impossible to conclude

that the Self-Consultation Regulations is consistent with Congress's intent in enacting section 7 of the ESA. Public Citizen v. U.S. Dep't of Health and Human Services, 332 F.3d 654, 662 (D.C. Cir. 2003). "[T]urn[ing] first, as we must, to the language of the statute, 'the most important manifestation of Congressional intent,'" id. ("quoting California ex rel. Brown v. Watt, 668 F.2d 1290, 1304 (D.C. Cir. 1981), the language of section 7 of the ESA could hardly be clearer. Indeed, as the Supreme Court has explained, "[o]ne would be hard pressed to find a statutory provision whose terms were any plainer than those in § 7 of the Endangered Species Act." TVA v. Hill, 437 U.S. 153, 173 (1978).

Once again, section 7 – which, tellingly, is captioned "Interagency cooperation," 16 U.S.C. § 1536 (emphasis added) – provides, in pertinent part that:

> Each Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency (hereinafter in this section referred to as an 'agency action') is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of species which is determined . . . to be critical . . ..

Id. at § 1536(a)(2) (emphasis added). Hence, since "[w]e begin our interpretation of the provision with the 'assumption that legislative purpose is expressed by the ordinary meaning of the words used,'" Bluewater Network v. EPA, 370 F.3d 1, 13 (D.C. Cir. 2004) (quoting Sec. Indus. Ass'n v. Bd. of Governors, 468 U.S. 137, 149 (1984)), the "ordinary meaning" of the words used in section 7(a)(2) compels the conclusion that Congress commanded – through use of the mandatory "shall" – "consultation with" the FWS or NMFS (the agency experts on listed species) concerning "any action" by an agency that might affect listed species or critical habitat, so as to "insure" that the action would not jeopardize the species or impair its critical habitat. See Miller v. French, 530 U.S. 327, 337 (2000) ("'[T]he mandatory 'shall' . . . normally creates an obligation impervious to judicial

discretion'") (internal citation omitted); see also Sierra Club v. Marsh, 816 F.2d 1376, 1386 (9th Cir. 1987) ("Section 7 imposes a duty of consultation [] on all federal agencies").

Thus, to sustain the Self-Consultation Regulation, the Court "would be forced to ignore the ordinary meaning of plain language," which is precisely what the Supreme Court said federal courts should not do in construing Section 7. TVA v. Hill, 437 U.S. at 173. It is impossible to reconcile the plain statutory language with a rule that allows the FWS and NMFS to be bypassed entirely with regard to a host of land-disturbing activities that may affect listed species and their habitats on "190 million acres of public land," FWS CR A.R., Vol. 10, at S60, including logging operations, road construction, and myriad other projects falling within the open-ended definition of "NFP" projects. 68 Fed. Reg. 68259, 68264; see also FWS CR A.R., Vol. 10, at S102-80 (78 page document summarizing 103 different kinds of NFP activities, including "road construction," "road maintenance," "[l]ogging systems," "development" of "recreational facilities," "[w]ater development," "[h]erbicide control," "[t]hinning," "[f]ence construction," "[a]bandoned mine restoration," and the "application of insecticides and pesticides"). Indeed, a rule that, on its face, authorizes action agencies to "unilaterally decide" which of their projects may be exempted from the traditional consultation process, FWS CR A.R., Vol. 2, at B13, as well as make the final determination – without any review whatsoever by the FWS or NMFS – as to whether their own projects are "likely to adversely affect" listed species or critical habitat, not only flagrantly violates, but makes a total mockery, of section 7(a)(2)'s express requirement for "consultation" on "any project" to "insure" that listed species are not jeopardized or critical habitat is not impaired.[21]

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[21] In response to the "[m]any comment[s]" that "adoption of the counterpart Regulation violates the plain language" of the ESA, the preamble to the final rule stated that the "regulation does not violate the language or spirit of the ESA" because the "counterpart regulation creates a

While the Court's "inquiry begins with the statutory text, and ends there as well if the text is unambiguous," Bedroc, Ltd., LLC v. United States, 541 U.S. 176, 183 (2004) – as it is here – if the Court nonetheless considers the legislative history, it simply reinforces the facial illegality of the Self-Consultation Regulation. Section 7 was described by Congress as "central to resolution of conflicts under the Act" because Congress believed that, "in many instances good faith consultation between the acting agency and the Fish and Wildlife Service can resolve many endangered species conflicts" by ensuring that the action agency incorporates endangered species protections into project decisionmaking and design. H. Rep. No. 1625, 95th Cong., 2d Sess. (1978) ("1978 House Report"), reprinted in ESA Leg. Hist. at 735, 736 (emphasis added).

Accordingly, in describing section 7(a)(2) in 1978 – when Congress amended the provision in response to the Supreme Court's ruling in TVA v. Hill – Congress explained that:

> [i]n addition to requiring Federal agencies to ensure that their actions do not adversely impact endangered species, the section also requires all federal agencies to consult with the

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new, carefully-structured training, monitoring and oversight relationship between the Service and the Action Agency as an alternative for the individual project-based concurrence system that was created in the Subpart B regulatory framework." 68 Fed. Reg. 68260 (emphasis added). But that explanation only serves to highlight the illegality of the Regulation because a system for "training" and post hoc "monitoring" of a small "sample" of USFS and BLM self-consultations every three years, see supra at 32-34, is simply not "consultation" on "any" project that might affect listed species or critical habitat.

Indeed, it is impossible to understand how even defendants can seriously maintain that they are, "in consultation" with the Services, "insur[ing]" that species are not jeopardized or critical habitat destroyed, when the "monitoring" program does not even allow for the reversal of erroneous NLAA determinations and defendants are apparently defining "success" as the USFS and BLM making the clearly wrong calls with respect to the need for formal consultation as to "only" 5% of all NFP projects. See supra at 33 & n. 13. Of course, even if the monitoring" system catches any such errors (assuming that they happen to be included in the "random sample" the monitoring "team" peruses every three years), the potentially irreversible damage to species at risk of extinction will have long since occurred – which is precisely the result Congress sought to avoid by requiring ongoing "consultation" with the Services.

> Department of the Interior (Department of Commerce in the case of marine species) when any of their actions may affected endangered species . . . .

1978 House Report, reprinted in ESA Leg. Hist. at 735 (emphasis added). The legislative history is replete with similar expressions of legislative intent that there be ongoing consultation with the Services regarding any project that "may" affect listed species or critical habitat, i.e., the threshold for informal consultation in the 1986 regulations that is eviscerated by the Self-Consultation Regulation. See, e.g., id. at 744 ("If the Federal action agency or the Secretary determines that a proposed action may affect a listed species or its habitat, immediate consultation shall be undertaken.") (emphasis added); id. at 743 ("It is the responsibility of each agency to review its activities or programs to identify any such activity or program that may affect listed species or their habitat. If a Federal agency determines that its activities or programs may affect listed species or their habitat, the agency should request assistance from the Secretary.") (emphasis added).[22]

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[22] See also id. at 736 ("The efficient operation of the Department's consultation teams is vital if future conflicts between endangered species and Federal development projects are to be avoided. The committee does not believe that part-time personnel can adequately perform the difficult task of consulting with other Federal agencies on projects that may result in species or habitat degradation.") (emphasis added); id. at 743 ("In setting about to insure that its actions will not result in species or habitat degradation, each agency is expected to make use of all available expertise both within its own organization and by consulting with the Secretary.") (emphasis added); S. Rep. No. 874, 95th Cong., 2d Sess. ("1978 Senate Report"), reprinted in ESA Leg. Hist. at 943-44 ("Many, if not most, conflicts between the Endangered Species Act and Federal actions can be resolved by full and good faith consultation between the project agency and the Fish and Wildlife Service or the National Marine Fisheries Service, as appropriate"); id. at 944 ("Under the current section 7 regulations, Federal agencies have a responsibility to identify activities or programs which they undertake that may affect listed species or their critical habitat and to request consultation with the Services concerning those activities or programs.") (emphasis added); see also id. at 957 (Remarks of Senator Culver) ("This section establishes a specific process of consultation which must take place between the construction agency and the U.S. Fish and Wildlife Service (FWS) which implements the Endangered Species Act. This mechanism has led to the resolution of a vast majority of the potential conflicts which have arisen since 1973.").

On the other hand, it is also absolutely clear that Congress did not trust action agencies to unilaterally decide whether their actions would adversely affect listed species or critical habitat – which is precisely what the Self-Consultation Regulation authorizes them to do. Rather, as explained by the Supreme Court, Congress recognized that section 7 was needed precisely because action agencies such as BLM and the USFS had historically afforded their "'primary missions'" a far higher priority than the conservation of imperilled wildlife. TVA v. Hill, 437 U.S. at 185 (internal citation omitted). As explained by Senator John Chafee, one of the principal architects of the ESA:

> [E]ach of my colleagues is fully aware of the commitment that many line agencies have to the completion of proposed projects, in many instances with less than appropriate attention to other important factors such as endangered species . . . They want to get the projects built. To allow a single agency head to determine the advisability of destroying a species or completing the agency's project as proposed, seems a bit like putting the fox in charge of the henhouse.

ESA Leg. Hist. at 995 (emphasis added).

Hence, it was exactly because Congress did not want the "fox in charge of the henhouse" that it demanded that "conflicts between the Endangered Species Act and Federal actions" be "resolved by full and good faith consultation between the project agency and the Fish and Wildlife Service or the National Marine Fisheries Service." Id. at 943-44 (1978 Senate Report). In the course of convincing the Senate to reject an amendment that would have "preempt[ed] the consultation process created under section 7" in favor of allowing action agencies to make their own determinations on compliance with the Act, Senator Chafee further explained that:

> Section 7 requires that Federal agencies consult with the Fish and Wildlife Service when their proposed activities or programs may affect a listed species . . . Conflicts between the Endangered Species Act and other Federal activities are being resolved through this administrative process. The result of consultation is that in almost all cases Federal agencies have found that for both proposed and ongoing projects, modifications or alternatives can be designed which avoid conflict with the Act. Senator Stennis' amendment fails in my

> judgment to recognize this fact. It seeks to avoid conflicts by outright exemptions from the act for large classes of projects. This appears to me stopping the consultation effort before it even has a chance to begin. Senator Stennis' approach has a number of shortcomings which will almost certainly result in unnecessary destruction of endangered species and habitats critical to their existence.

Id. at 994-995 (emphasis added); id. at 1012 (Remarks of Senator Wallop) (the rejected amendment would "not allow us even to go through the consultation process," but would relegate judgments on species impacts to an action agency "whose basic problem in life is not endangered species but the efficient carrying out of whatever that agency is designed to do") (emphasis added).

If Congress believed – as it most assuredly did in enacting and amending the ESA – that "preempt[ing] the consultation process created under section 7" would "result in unnecessary destruction of endangered species and habitats critical to their existence," then it cannot possibly be the case that defendants are free to accomplish the same subversion of section 7 through administrative fiat. Rather, this is the quintessential case where a regulation is contrary to the "'particular statutory language at issue, as well as the language and design of the statute as a whole,'" Household Credit Services, Inc. v. Pfennig, 541 U.S. 232, 239 (2004) (internal citation omitted), and hence must be invalidated under the first step of Chevron.

Since the Self-Consultation Regulation conflicts with the "unambiguously expressed intent of Congress," Chevron, 467 U.S. at 843, the Court need go no further. But even if the Court somehow found Congress's intent "ambiguous," id., defendants' approach in the Regulations – under which post-hoc "monitoring" of a handful of action agency decisions substitutes for actual, ongoing consultation – is certainly not a "reasonable construction of the text" and legislative intent, as it must be to pass muster under the second step of Chevron. Barnhart v. Thomas, 540 U.S.20, 26 (2003) (emphasis added).

Indeed, the Self-Consultation Regulation is contrary to defendants' own prior interpretation of the language and purpose of section 7. When the Reagan Administration promulgated the general consultation regulations in 1986 – thus requiring action agencies to enter into formal consultation unless the FWS or NMFS expressly concurs in a "not likely to adversely affect" determination – the Services stated that the regulations "properly and accurately implement[]" the ESA and "afford[] the protection mandated by section 7 of the ESA." 51 Fed. Reg. 19927 (June 3, 1986) (emphasis added), precisely because the process "utiliz[ed] the expertise of the Service to evaluate the [action] agency's assessment of potential effects or to suggest modifications to the action to avoid potential adverse effects." Id. at 19949.[23]

The Services also stated that the "purpose" of the regulations allowing agencies to consult with the Services "informally" to determine whether projects might adversely affect species – and hence necessitate formal consultation – was to "streamline the consultation process while maintaining the protections afforded species under section 7." Id. at 19927 (emphasis added).

The preamble to the 1986 regulations further explained that the

> Service believes that informal consultation is extremely important and may resolve potential conflicts (adverse effects) and eliminate the need for formal consultation. Through informal consultation, the Service can work with the Federal agency and any applicant and suggest modifications to the action to reduce or eliminate adverse effects.

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[23] Prior to 1986, whenever an agency determined that its action "may affect" a listed species, it was required to initiate formal consultation and obtain a full Bio. Op. from the Service. 51 Fed. Reg. 19948. The 1986 regulations retained this low "trigger" for formal consultation, but created an "exception" for situations where the action agency could convince the Service that the action could be carried out without harming listed species. Id. at 19949 ("the burden is on the Federal agency to show the absence of likely, adverse effects to listed species or critical habitat as a result of its proposed action in order to be excepted from the formal consultation obligation") (emphasis added). But the Self-Consultation Regulation undermines the entire point of this tradeoff by allowing the action agency to invoke the "exception" without meeting the concomitant "burden" to persuade the Service that was imposed by the 1986 rule.

Id. at 19949 (emphasis added). Likewise, in a "Section 7 Consultation Handbook" issued in 1998, the Services stressed that informal consultations protect species because they

> clarify whether and what listed species, proposed, and candidate species or designated or proposed critical habitats may be in the action area; determine what effect the action may have on these species or critical habitats; explore ways to modify the action to reduce or remove the adverse effects to the species or critical habitats; determine the need to enter into formal consultation . . . ; and explore the design or modification of an action to benefit the species.

Section 7 Consultation Handbook (March 1998), at 3-1 (quoted in FWS CR A.R., Vol. 6, at K153). Plainly, therefore, by eliminating any consultation – including the "informal" consultations designed to "streamline" the process while also protecting species – with regard to a myriad of potentially harmful projects, the Services have also contravened their own prior – and far more reasonable – interpretation of the meaning and function of section 7(a)(2) of the ESA.[24]

B. The Self-Consultation Regulation Violates the APA.

The Self-Consultation Regulation is also arbitrary and capricious because, as discussed earlier, defendants have failed to offer even a coherent and consistent explanation – let alone one that is

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[24] While the original section 7 regulations issued in 1986 authorize the Services to adopt "counterpart" regulations, see 50 C.F.R. § 402.04, such regulations were intended simply to "allow individual Federal agencies to 'fine tune' the general consultation framework to reflect their particular program responsibilities and obligations." 51 Fed. Reg. 19937. Thus, the Services did not remotely suggest that such a "counterpart" regulation could simply dispense with the consultation process completely, with respect to an entire category of agency actions. To the contrary, the Services made clear that any "[s]uch counterpart regulations must retain the overall degree of protection afforded listed species by the Act and these regulations," id. (emphasis added). As pointed out by the FWS's Regional Directors, that is obviously not the case with regard to a Regulation that allows action agencies to decide unilaterally whether their own projects will adversely affect species, and hence is "inherently less protective than the existing regulations." FWS CR A.R., Vol. 6, at K417 (memo from Director of FWS Region 5) (emphasis added). Indeed, in adopting the 1986 regulations, the Reagan Administration rejected a proposal that the general trigger for formal consultation be raised from "may affect" to "may adversely affect" precisely because it would have "yielded too much discretion to action agencies" and would not have preserved the Services' role in determining which actions are "likely to have an adverse effect[]." 51 Fed. Reg. 19949 (emphasis added).

supported by record evidence – for why a radical departure from the Services' longstanding approach to section 7 was either necessary or appropriate. As the Court of Appeals has explained, to determine whether an agency "decision reflects a 'rational connection between the facts found and the choice made,' a reasonable explanation of the specific analysis and evidence upon which the Agency relied is necessary." Bluewater Network, 370 F.3d at 21 (quoting State Farm, 463 U.S. at 43); see also Am. Lung Ass'n v. EPA, 134 F.3d 388, 392 (D.C. Cir. 1998) ("judicial review can only occur when agencies explain their decisions with precision, for '[i]t will not do for a court to be compelled to guess at the theory underlying the agency's action'") (internal citation omitted).

As explained previously, when they proposed the Regulation in the first instance, defendants asserted that it was needed to "streamline consultation on proposed projects that support the National Fire Plan" because consultations had "caused delays" in the approval of necessary NFP projects, and the "proposed counterpart regulations will effectively reduce these delays" and result in "faster environmental reviews of proposed land management projects . . .." 68 Fed. Reg. 33806, 33808 (emphasis added). But when public commenters – as well as the FWS's own Regional Directors and CEQ – pointed out that the "proposed rule has failed to offer any empirical evidence substantiating the claim" that consultations "have unnecessarily delayed active land management activities," instead of pointing to any such evidence, the final rule asserts that the "issue is not whether the regulatory process has delayed NFP projects," 68 Fed. Reg. at 68258 (emphasis added) – which is exactly what the proposed rule had said, in no uncertain terms, was the issue.

Since defendants evidently could not substantiate the central rationale they initially proffered for the rule – and, internally at least, admitted they could not support that rationale, see, e.g., FWS CR A.R., Vol. 3, at E140, defendants, when adopting the final rule, simply changed the rationale from

"delays" that had been "caused" to "anticipate[d] . . . future" delays:

> The number of consultations conducted for NFP projects is currently relatively low; however the Service anticipates that the number of consultations requested for projects that implement the NPF will increase substantially in the future, as additional funding and effort is directed toward implementation of the NFP.

68 Fed. Reg. at 68258 (emphasis added). Yet, once again, defendants provided absolutely no evidence establishing the extent to which NFP projects will "increase . . . in the future" or, more important, the concrete basis for predicting that the "anticipat[ed] . . . number of consultations" will cause any delays "in the future." See Bluewater Network, 370 F.3d at 22 ("We can defer to the Agency's prediction of the feasible pace of implementation only if it has adequately explained the basis for that prediction.") (emphasis added); see also Natural Resources Defense Council v. EPA, 655 F.2d 318, 328 (D.C. Cir. 1981) ("the agency must also provide a reasoned explanation of its basis for believing that its projection is reliable").

But even with regard to that rationale for a dramatically different approach to section 7 of the ESA, the preamble to the final rule is at war with itself, since it concedes that the Services and action agencies "currently have several agreements in place" that already "streamline the process significantly by improving coordination between the consulting agencies" regarding NFP projects. 68 Fed. Reg. 68259. Thus, in August 2000, the Services, USFS, and BLM entered into a "Memorandum of Agreement" ("MOA") for the precise purpose of "improv[ing] the efficiency and effectiveness of plan and programmatic level section 7 consultation processes." FWS CR A.R., Vol. 10, at S1 (MOA, ESA Section 7 Programmatic Consultations and Coordination).

The very purpose of the MOA was to "establish a general framework for a 'streamlined' (i.e., easier and more effective) process for interagency cooperation." Id. At the same time, the MOA

stressed that "[n]othing in this MOA is intended to amend 50 CFR part 402" – the general regulations implementing the consultation process – and that "[t]his streamlined process will provide a number of efficiencies, allowing the agencies to better achieve compliance with the ESA and the regulations at 50 CFR part 402 without altering or diminishing the agencies' existing responsibilities under the ESA or its regulations." Id. (emphasis added). The MOA further stated that "[i]t will result in a shortened time frame for the appropriate consultation response (a goal of 30 days or less for concurrence letters and 90 days or less to complete formal consultation)," but that the MOA "in no way alters the commitment of the action agencies to consult at the site-specific level." Id. at S1, S2 (emphasis added).

Even further, however, in October 2002, FWS and NMFS issued a memorandum to their Regional Directors and Administrators setting forth "Alternative Procedures for Streamlining Section 7 Consultation on Hazardous Fuels Treatment Projects." FWS CR A.R., Vol. 10, at S81 (emphasis added). As suggested by the title, this "guidance" document was specifically designed to ensure that the consultation process is "able to stay ahead of the fire management agencies' hazardous fuel treatment projects." Id. Consequently, the guidance "encourages early coordination and cooperation at the project planning stage, the 'batching' of similar projects, and use of design criteria or screens to streamline the consultation process while minimizing the potential for adverse effects on listed species and their habitats at both the landscape and site-specific levels." Id. at S82 (emphasis added). Therefore, according to the October 2002 document, "[s]everal streamlining techniques have been found to be effective" and were already "being used in some areas to facilitate consultation on projects being implemented under the National Fire Plan," while, at the same time, being "consistent with the requirements of section 7(a)(2) and its implementing regulations (50 CFR 402)." Id.

(emphasis added).

Moreover, in addition to these NFP-specific measures, the Services' longstanding section 7 regulations also provide that, "[w]here emergency circumstances mandate the need to consult in an expedited matter, consultation" between the action agency and the Service "may be conducted informally through alternative procedures that the Director [of the Service] determines to be consistent" with section 7 of the ESA. 50 C.F.R. § 402.05(a). This provision for "expedited" consultation "applies to situations involving acts of God, disasters, casualties, national defense or security emergencies, etc." Id. Accordingly, if there were ever a need to consult even more rapidly than thirty days – e.g., in the event of an ongoing fire emergency – the Services' longstanding regulations already expressly provide for that exigency.

In any case, just eight months before proposing the Self-Consultation Regulation, the Services had already adopted specific "techniques" designed to "streamline" consultations on NFP projects and "provide procedures for agencies to efficiently and effectively meet the requirement that each individual hazardous fuels treatment project received the required individual review and complete the requirements of section 7 consultation." Id. at S88 (emphasis added). It would be one thing, of course, if, during those eight months, the Services and action agencies had learned that the "streamlining" techniques were, or would be, unable to prevent delays in approval of necessary projects. But that is hardly the case, as the FWS's Regional Directors – who were responsible for actually administering the October 2002 guidance – advised defendants in no uncertain terms.[25]

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[25] See, e.g., FWS CR A.R. Vol. 6, at K391 ("the Service in Region 2 is already completing informal consultations within 30 days"); id. at K402 (Southeast Region) ("The short response time is not likely to change with these counterpart regulations."); id. at K420-21 (Region 6) ("Information consultations are routinely completed well within 30 days of the action agencies' request to our office . . . As long as the Action Agency is coordinating with our office

Consequently, in the final rule, defendants had little choice but to concede that preexisting "agreements streamline the process significantly by improving coordination between the consulting agencies," and that "[t]hese types of streamlining processes can work well to meet statutory timelines." 68 Fed. Reg. 68259 (emphasis added). But rather than abandon the Self-Consultation Regulation in light of the seemingly damning concession that defendants have no factual basis for asserting either past or likely future delays, defendants instead adopted an even more legally and logically bankrupt rationale for the Regulation: that the recently implemented "streamlining" measures, while "work[ing] well," "still encumber the Service's biologists in requiring concurrences for NLAA actions" and "still require[] involvement of the Service in the concurrence decisions . . .. Id. (emphasis added).

Thus, the ultimate rationale for the Regulation is not only totally tautological – i.e., defendants must excise Service biologists from the consultation process because Service biologists are involved in the consultation process – but also a patent abdication of the role assigned to the Services by Congress. It is hard to conceive of a more arbitrary and capricious course of conduct than one in which defendants found it necessary to play a shell game with the underlying justification for the rule, only to end up with the rationale, in effect, that defendants simply disagree with the consultation process mandated by Congress.[26]

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and apprising the Service of potential effects, informal consultation is already an efficient, timely process."; "[E]xtensive streamlining has already been put in place for NFP projects, and should only improve with time, as experience is gained.") (emphasis added); id. at K427 (Region 3) ("We are unaware of any data supporting the contention that significant delays are problematic").

[26] In defendants' continuing struggle to proffer some rationale for the Regulation, the preamble to the final rule also suggests that the Services' review of NLAA determinations was somehow "diverting their attention from actions that require formal consultation." 68 Fed. Reg. 68529 (emphasis added). But this rationale is simply circuitous, since the Services' review of

While defendants' failure to proffer a defensible rationale for the Regulation is more than sufficient to deem it arbitrary and capricious, the Regulation is equally vulnerable on the other side of the equation, i.e., defendants have not even begun to meaningfully address what will be lost by allowing action agencies to make unilateral decisions as to whether their own actions will adversely affect listed species or critical habitats. As noted, the FWS's own regional offices stressed that the Services' ongoing review of action agencies' NLAA determinations has in fact had enormous benefits for listed species, both by encouraging necessary modifications in projects to mitigate adverse effects, and by ensuring that the best available information on species is brought to bear in evaluating projects, including data on the potentially significant cumulative effects of many individually small projects.[27] The Regional Directors specifically emphasized – as did Congress when it enacted section

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action agencies' findings that their own projects will not adversely affect listed species or critical habitat is the regulatory mechanism by which the Services have determined which actions even require formal consultation. Moreover, once again, neither the final rule, nor anything else in the record, presents a stitch of evidence that Service biologists have been "diverted" from formal consultations on NFP projects by virtue of their work on informal consultations. To the contrary, several FWS Regional Directors not only expressly rejected any such theory, but suggested that the need to implement the Self-Consultation Regulation and ACAs would be far more of a diversion than simply implementing the "streamlining" agreements already in place. See, e.g., FWS CR A.R., Vol. 10, at K415 ("[I]t would be far more efficient to review and provide concurrences on each action rather than the time and effort required for the Service to coordinate, monitor, and evaluate an agency's implementation of a single ACA."); id. at K427 ("informal consultations have not diverted FWS resources . . . These unsubstantiated arguments undermine the credibility of the proposed regulations") (emphasis added).

[27] See, e.g., FWS CR A.R., Vol. 10, at K426 (Region 3) ("[W]e successfully utilize informal consultation, and thereby, substantially eliminate the need for formal consultation and avoid adverse effects to listed species. The tenor of the proposed regulations dismisses out of hand the merits and legitimate utility of informal consultation.") (emphasis added); id. at K427 ("A great number of [NLAA] determinations are made only after the Service reviews the proposed action and identifies measures to avoid adverse effects. Although many informal consultations result in only minor changes, those changes have tremendous conservation benefit.") (emphasis added); id. at K428 ("erroneous determinations are often submitted by action agencies, and only after Service review is the correct finding made") (emphasis added); id.

7 – that the "Action Agencies will be challenged to maintain biological objectivity in light of differences in primary agency missions." FWS CR A.R., Vol. 10, at K416 (Region 5).[28]

The preamble to the final rule concedes that "[m]any commenters believe that the different missions between the Action Agencies and the Service will not allow the Action Agencies to make decisions that would be 'equally as protective of listed species and critical habitat." 68 Fed. Reg. 68259. The preamble further acknowledges that "many commenters noted that historically, the action agencies have pursued environmentally damaging projects," and that "[m]any commenters suggested that eliminating the Service concurrence is like asking the fox to watch the henhouse," id.(emphasis added) – the same phrase used by Senator Chafee in explaining why Congress had required consultation with the Services. See supra at 46.

However, rather than refute these objections – or even dispute that the BLM and Forest Service have routinely "pursued environmentally damaging projects" – defendants simply asserted

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at K420 (Region 6) ("[T]he informal consultation process on a regular basis serves to avoid or minimize project impacts to listed species in a manner that ultimately eliminates the need for formal consultation . . . The counterpart regulations are likely to reduce interagency coordination over the long-term, and consequently reduce the opportunities to develop, and implement beneficial habitat projects.") (emphasis added); id. at K419 ("these regulations will result in a loss of consistency and quality in [ESA] consultations"; "We believe it will be difficult for the action agencies to continually update the environmental baseline conditions for each species, as they will not automatically receive information about the affected species throughout its range"); id. at K416 (Region 5) ("wildlife biology applied in the context of the ESA is a highly specialized field in which no other agency has equivalent expertise"; "The Service's expertise is constantly evolving based on assimilation of new information by Service biologists.").

[28] See also id. at K421 (Region 6) ("The Action Agencies have different missions than the Service and we cannot discount the overriding conflicts that the agencies' wildlife, plant, and fishery biologists face from internal pressures to meet quotas for timber salvage harvest, prescribed fire, etc. Thus, we do not believe that implementation of this proposed regulation will be equally as protective of listed species and designated critical habitat as the current procedures.") (emphasis added).

that the "Action Agencies will appropriately implement their responsibilities under section 7 and these regulations," 68 Fed. Reg. at 68259, and that the action agencies may, under the Self-Consultation Regulation, voluntarily "request informal consultation" if they feel like it. Id. Yet those superficial responses do not even begin to come to grips with the grave concerns raised by "many commenters" and the Services' own officials that action agencies do not have exactly the same expertise as the Services, that USFS and BLM employees do face serious pressures to disregard or downplay the impacts of their projects on listed species – which is why Congress required consultation – and that the existing consultation process has, in fact, had substantial benefits for species that will be lost as a result of the Regulation. Once again, therefore, it could not be clearer that defendants have "'entirely failed to consider an important aspect of the problem,'" and also ignored a "statutorily mandated factor." Public Citizen v. Fed. Motor Carrier Safety Admin., 374 F.3d 1209, 1216, 1222 (D.C. Cir. 2004) (quoting State Farm, 463 U.S. at 43).

Even further compounding defendants' clear APA violation is that the Self-Consultation Regulation not only allows the USFS and BLM to self-consult, but also allows the action agencies to decide unilaterally what projects to self-consult on, while providing no meaningful definition of NFP projects subject to the new rule. Thus, while many commenters – as well as the Services' own officials – urged defendants to at least coherently define the universe of projects subject to the rule and/or provide some check on the action agencies' invocation of it, see, e.g., FWS CR A.R., Vol. 10, at K386 (Region 1) ("A clearer definition of the term 'National Fire Plan' should be included in the final rule."), defendants refused to adopt either minimal safeguard.

Instead, once again, the final rule defines a "Fire Plan Project" as "an action determined by the Action Agency to be within the scope of the NFP as defined in this section," and, in turn, defines

the NFP as the "September 8, 2000, report to the President from the Departments of the Interior and Agriculture[] outlining a new approach to managing fires, together with the accompanying budget, requests, strategies, plans, and direction, and any amendment thereto." 68 Fed. Reg. 68259, 64 (emphasis added). Remarkably, however, the Administrative Record does not even contain any of these "accompanying budget requests, strategies, plans, and direction"; and, when plaintiffs asked defendants to supplement the Record with them – on the theory that they must have been considered by defendants since the final rule incorporated them into a regulatory definition – plaintiffs were advised by government counsel that "all that was considered by the FWS was the report," Exh. 2 at 2 (emphasis added) – i.e., the September 8, 2000 report itself – and hence the other materials comprising the regulatory definition were not (and would not) be included in the Record because they were not even "considered" by the agency decisionmakers. Id. In other words, defendants not only gave the action agencies unfettered discretion to decide what an NFP project is – and thus when the Self-Consultation Regulation may be invoked – but they may make those decisions based on an open-ended definition that the Services themselves do not even know the contours of because it incorporates materials that the Services say they never even glanced at before adopting the final rule.

There is nothing the preamble to the final rule could say to justify this bizarre approach – which is far beyond arbitrary, particularly in the context of Congress's purpose in adopting the ESA and section 7 in particular – but, if possible, the preamble only succeeds in further compounding the problem. Thus, the preamble says that, "[w]hile the definition is broad, the Action Agency will ultimately have to determine if the action will further the goals of the NFP" and "will have the responsibility to justify whether any action it is undertaking falls within the NFP scope." 68 Fed. Reg. 68259 (emphasis added). But the defect with the rule is not just that the definition is extremely

"broad," and its application entrusted entirely to the "fox guarding the henhouse" – although those concerns alone would be sufficient to invalidate the rule – but that the "definition" is, quite literally, meaningless, i.e., noone, including, most important, the agency decisionmakers who adopted an entirely new approach to section 7, even knows what the definition encompasses because they do not know – and claim to have never read – the "budget requests, strategies, plans, and direction, or any amendments thereto," the definition subsumes. Once again, this is the very essence of arbitrary and capricious decisionmaking, particularly in the context of a statute designed to codify the "institutionalization of caution" on behalf of species already on the brink of extinction. TVA v. Hill, 437 U.S. at 178.

C. Defendants Adopted the Regulations in Violation of NEPA.

For many of the reasons discussed above, it is also apparent that defendants' cursory Environmental Assessment must be set aside for more reasoned analysis. To begin with, the EA's blanket assertion that the Self-Consultation Regulation "would not have any environmental effects," FWS CR A.R., Vol. 4, at G184 (emphasis added), inexplicably ignores the views of the FWS's own Regional Directors, as well as many public commenters, who pointed to a multitude of ways in which allowing action agencies to make their own NLAA determinations on a vast but ill-defined array of habitat-disturbing projects will undoubtedly have "environmental effects," including serious adverse impacts on listed species and their habitats. See supra at 55.

Moreover, the EA completely ignores a number of the CEQ "significance" criteria that clearly counsel in favor of preparation of an EIS here. For example, it is evident that the "effects" of the Regulations on the "quality of the human environment are likely to be highly controversial," 40 C.F.R. § 1508.27(4), when the FWS's own Regional Directors are predicting that the Regulations

will have broad, adverse impacts on listed species and their habitats. It is equally clear that the Regulations "establish a precedent for future actions with significant effects or represent[] a decision in principle about a future consideration." Id. at § 1508.27(b)(6) (emphasis added). As many of defendants' own officials explained, "[a]doption of this proposed regulation will facilitate approval of requests by other Action Agencies," since the interpretation of section 7 and underlying rationale embodied in the Regulation can obviously be applied to other agencies that "advocate that with training, they will [also] be able to make appropriate effect determinations." FWS CR A.R., Vol. 6 at K417 (Region 5); see also id. at K429 (Region 3) ("Upon promulgation of the counterpart regulations, we anticipate that other agencies will also wish to adopt similar counterpart regulations for non-NFP actions. The proposed rule sets the precedent for these agencies to follow.") (emphasis added). Yet the EA does not even acknowledge these far-reaching ramifications of the Regulation, let alone coherently explain why they are not sufficiently significant to warrant preparation of an EIS.[29]

CONCLUSION

For the foregoing reasons, the Court should set aside and remand both the Self-Consultation Regulation and the July 2003 Notice on the Lynx listing decision previously remanded by the Court.

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[29] In fact, the Services, in conjunction with the Environmental Protection Agency ("EPA"), have already expanded the self-consultation approach to decisions by EPA regarding the effects of pesticides and similar chemicals on listed species. See 69 Fed. Reg. 47731 (Aug. 5, 2004). Moreover, defendants' inadequate NEPA compliance on the precedential effects of the Regulations at issue here is also already injuring plaintiffs because, predictably, the USFS and BLM are already arguing that the rationale for the Self-Consultation Regulation applies to all projects carried out by the agencies. See Stone Dec. (Exh. 12) at ¶ 15 & Attach. D at 4 (Dec. 15, 2003 memo from USFS and BLM officials) ("we believe that the concept being advocated in the [Self-Consultation] regulations should apply to all projects that meet the land management objectives of the FS and BLM, and not just those that are considered NFP projects").

Respectfully submitted,

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